Tagore Law Lectures — 1882.

# THE LAW

OF

# LIMITATION AND PRESCRIPTION
## (IN BRITISH INDIA),

## INCLUDING EASEMENTS.

WITH

*N APPENDIX OF ACTS, REFERENCES TO THE LATEST CASES, AND AN INDEX.*

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CALCUTTA:
THACKER, SPINK AND CO.,
Publishers to the Calcutta University.
BOMBAY: THACKER & CO., LD. MADRAS: HIGGINBOTHAM & CO.
LONDON: W. THACKER AND CO.

1885.

CALCUTTA:
PRINTED BY THACKER, SPINK AND CO.

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# ADDENDA ET CORRIGENDA.

Page 7. Add the following to foot-note (3):

Lavergne *v.* Hooper, I. L. R., 8 Mad., 149, 154.

" 12. *For* sec. 29, Act XV of 1877, *read* sec. 28 of Act XV of 1877.

*For* sec. 28 of Act IX of 1871, *read* sec. 29 of Act IX of 1871.

" 17. *After* adverse holder, in line 13, add the following:

See I. L. R., 9 Bomb., p. 229 (note).

" 34. Add the following to foot-note (1):

The law of prescription rests on a presumption, that a right held for a certain time without contest as against a person capable of contesting it, could not have been successfully contested. (*Per* West, J., I. L. R., 9 Bomb., p. 225.)

" 42. *After* Boulnois' Reports, p. 70, line 3 from bottom, add:

See also I. L. R., 9 Bomb., p. 229.

" 43. Line 14:

*For* Lordship, *read* Lordships.

" 47. Marginal note:

*For* personal law, *read* personal laws.

" 65. Fourth line from bottom:

*For* cestui qui trust, *read* cestui que trust.

" 94. Last line. Add the following:

It is the same under the later Acts. See I. L. R., 11 Cal., 264, 287.

" 98. Add to foot-note (5):

See also I. L. R., 9 Cal., 65.

Add to foot-note (6):

See I. L. R., 8 Bomb., 535.

" 101. Add to foot-note (4):

See also I. L. R., 7 Bomb., 96.

" 103. Add to the 1st para:

It is sufficient if such debt is legally recoverable at the date of the institution of the plaintiff's suit, though barred at the date of claiming the set-off. (See I. L. R., 7 All., 284.)

Add to foot-note (10):

See also I. L. R., 2 All., 455, 9.

" 112. Add to foot-note (7):

Compare I. L. R., 9 Bomb., 137.

Page 113. Twentieth line:

*For* anterior to the period, *read* except one *within* the period.

,, 117. Second line from bottom. Add:

See I. L. R., 10 Cal., 371.

,, 130. Foot-note (2). 11th line from bottom:

*For* the defendant, *read* a person.

9th line from bottom:

*For* defendant, *read* purchaser.

8th line from bottom:

*For* defendant, *read* the purchaser.

,, 141. Third line from bottom of text:

*For* right, *read* rights.

,, 149. Para. 3. Add the following:

A sub-tenant may plead limitation, although his immediate landlord is a tenant of the plaintiff. See 12 C. L. R., p. 458.

,, 151. *After* line 2, add the following:

In a recent case it has been laid down, that an encroachment made by a tenant upon land adjoining to, or even in the *neighbourhood* of, his holding, is presumed, in the absence of strong evidence to the contrary, to be made for the benefit of the landlord; that this rule applies to all land so encroached upon, whether belonging to the landlord or to a *third* person; that if the tenant has acquired a title against the third person by adverse possession, he has acquired it for his landlord, and not for himself; that where the tenant encroaches on the land of his landlord without his express or implied acquiescence, he has *no* right to retain the land so encroached upon till the *end* of his tenancy. Nuddyar Chand *v.* Meajan, I. L. R., 10 Cal., 820. But, as to the last point, see Woodfall's Law of Landlord and Tenant, 12th Ed., pp. 667, 668, 714.

,, 157. Foot-note. Add:

See also I. L. R., 10 Cal., 577.

,, 164. Last two lines of the text:

*For* adverse possession as against such purchaser commences, *read* the adverse possession of such purchaser is deemed to commence.

,, 166. Add the following to foot-note (5):

Generally speaking, neither a special mode of devolution, nor an incapacity for alienation, will prevent limitation from operating against an estate. Adverse possession against a father (though governed by the Mitakshara) bars not only his right, but the right of his issue. See I. L. R., 9 Bomb., 224, 229.

Add to foot-note (6):

See 13 C. L. R., 372, F. B.; (S. C.) I. L. R., 9 Cal., 934.

Page 168. Add to foot-note (3):

See also Yusuf Ali *v.* Chubbee, 5 N. W. P., 122. As to the *onus* of proof in such cases, see 1 C. L. R., 155.

„ 169. Line 5. Add the following:

But see p. 339 (note), *infra*.

„ 171. Foot-note (6). Add:

See also I. L. R., 4 Bomb., 529, F. B.

„ 176. Third line from bottom. Add:

This principle of construction applies only where the specific words preceding the generic words are all of the same nature, and it is further subject to the proviso that there is nothing to indicate that a wider sense was intended. Gosvami *v.* B. Robb, I. L. R., 8 Bomb., 399, 401.

„ 181. Add to foot-note (8) the following:

"Still it must not be supposed that every decision which causes a hardship, is necessarily good law." (*Per* Peacock, C. J., 9 W. R., p. 59.)

„ 195. Add to foot-note (9), the following:

See also 9 W. R., p. 58.

„ 199. Foot-note (3). Add:

See p. 634, *infra*.

„ 210. Foot-note (10). Add:

See I. L. R., 10 Cal., 748; and I. L. R., 11 Cal., 55.

„ 214. Foot-note (1). Add:

See also I. L. R., 1 All., 254; I. L. R., 3 Mad., 92.

„ 216. Foot-note (9), para. 2. Add:

See also I. L. R., 8 Bomb., 529.

Last para. Add:

See sec. 185, Act VIII of 1885, which *expressly* enacts that secs. 7, 8 and 9 of Act XV of 1877 shall not apply to suits under that Act.

„ 219. Foot-note (7). Add:

Cf. I. L. R., 6 All., 457.

„ 223. Foot-note (9), line 5:

*For* (;) *after* duty, *read* (,)

„ 227. Foot-note (4). Add:

See also art. 164.

„ 229. Foot-note (8). Add:

See the more recent cases reported in I. L. R., 9 Cal., 644; I. L. R., 10 Cal., 748; and I. L. R., 11 Cal., 55.

„ 231 & 645. Para. 4. Add the following:

Art. 178 was not intended to apply to an application for probate, an application under the Religious Endowments Act, an application for the appointment of new trustees, &c. The article does not apply to applications for certificates to collect debts. I. L. R., 8 Mad., 207, 208.

Page 235. Lines 16 & 17 :

*For* does not exempt him from, *read* would be no bar to.

Foot-note (1). Add :

Inability to sue by reason of the Court being closed on the last day of the period of limitation, (sec. 5), is not treated as an *inability* within the meaning of sec. 9. As to *inability* apart from *disability*, see sec. 9, proviso, and I. L. R., 8 Bomb., pp. 569, 570.

" 237. Foot-note (5). Add :

Naranji *v.* Mugniram has also been dissented from by Birdwood, J. I L. R., 8 Bomb., 561.

Foot-note (6). Add :

But compare the remarks of Turner, C. J. on the effect of the repeal of sec. 269, Act VIII of 1859. I. L. R., 8 Mad., 134.

" 249. Para. 2. Add :

A European British subject temporarily residing, but not domiciled, in British India, attains his majority at the age of 21. I. L. R., 7 All., 490, F. B.

" 252. Foot-note (4). Add :

See 9 C. L. R., 13.

" 278. Foot-note (6). Add :

See also I. L. R., 9 Cal., 730.

" 295. Foot-note (1). Add :

See p. 535, *infra*.

" 308. Line 15 from bottom.

*For* If, *read* Is.

" 329. Line 3 from bottom :

*For* and, *read* land.

" 336. Para. 2. Add :

On the expiration of the prescribed period, the ownership of the adverse holder becomes complete except as against some wholly independent title. (*Per* West, J., I. L. R., 2 Bomb., p. 238.)

" 353. Foot-note (2). Line 5

*For* freshold, *read* freehold.

" 389. Foot-note (6). Add.

See p. 431 (note 10), *infra*.

" 408. Foot-note (6). Line 4 :

*For* prove (constructive) an uninterrupted enjoyment, *read* prove an uninterrupted (constructive) enjoyment.

" 507. Line 7 from bottom. Add :

See I. L. R., 11 Cal., 55.

" 509. Line 21. Add the following :

See also 10 C. L. R., 281, 286, P. C. Cf. I. L. R., 6 Bomb., 193 ; I. L. R., 7 Calc., 394, 399. See pp. 619, 622, *infra*.

Page 510. Note to "foreign country." Add:

The Berars are *not* British territory. The Laccadive, the Andaman and Nicobar Islands, Aden, &c., *are* parts of British India. See I. L. R., 9 Bomb., 244, 249.

,, 522. 1st para.:

As to limitation in the case of a sale, of a trusteeship with the annexed estate, by one of two trustees, see I. L. R. 7 Mad., 337.

,, 528. Last but one para.:

*For* to decide suit, *read* to decide a suit.

,, 529. First para. Add:

*Limitation* is not a defect of *jurisdiction*, I. L. R., 11 Cal., 264.

,, 530. Notes under sec. 15. Add:

An order prohibiting the surviving partner of a firm from *collecting* any sums due to the firm, is an order or injunction within the meaning of this section. I L. R., 8 Mad., 229, 234.

,, 539. Para. 2. Add:

One of several heirs of the original creditor cannot sue for his share of the debt. I. L. R., 7 All., 314.

Para. 5:

*For* the other, *read* the others.

Para 7. Add:

Correcting a misdescription of a firm by adding the names of the partners is not adding new defendants. I. L. R., 7 All., 284.

,, 542. Para. 2. Illus. (b). Add:

(The English rule in respect of *special damage*, in cases of slander, should not be adopted in British India. See I. L. R., 8 Mad., 175.)

Lines 18 & 19. *After* cause of action, add:

But, according to Turner, C. J., and Ayyar J., the rule of English law which prohibits, except in certain cases, an action for damages for slander, unless special damage is alleged, should *not* be adopted in British India I. L. R., 8 Mad., 175.

,, 552. Add:

According to Turner, C. J., and Hutchins, J., the repeal of sec. 269 of Act VIII of 1859 on 1st Oct 1877 did not affect an order under that section passed on the 10th Aug. 1877. A suit to establish right must, under the repealed section, be barred if not brought within one year of the order. I. L. R., 8 Mad., 134.

Page 554. Add the following to the notes under art. 12

An execution-sale is confirmed when an objection to the sale is disallowed by the *first* Court under sec. 312 Civ. Pro. Code. I. L. R., 11 Cal., 287.

„ 555. Para. 1. Add the following :

For a case of a *stranger* purchasing in execution of a barred decree, see I. L. R., 11 Cal., 287.

„ 560 Add to the notes to art. 25 :

According to the Madras High Court, the rule of English law as to necessity of *special damage* does not apply to British India. I. L. R., 8 Mad., 175.

„ 571. Add to the note to art 53 :

See I. L. R., 7 All., 284.

„ 594. Last but one para. Add :

The correctness of some of these cases has been doubted. See I L. R., 8 Cal., 402, 419.

„ 606. Add the following to the notes to art. 120 :

A suit for apportionment of rent to specific portions of an entire tenure is governed by the six years' rule. I. L. R., 11 Cal., 284.

„ 610. Para. 4. Add :

As to adverse possession of service *vatan* lands, see I. L R., 9 Bomb., 198, F. B.

„ 611. Add to the note to art. 126 :

*Adverse* possession against the father bars both the father and the sons, I. L. R., 9 Bomb., p 224.

„ 618. Para. 3. Add :

The correctness of the rulings in 22 W. R and I L. R., 6 Cal. has been doubted See I. L. R., 8 Cal., 402, 419.

„ 633. Para. 3. Add the following :

The same remarks might apply to a mortgage which "executed itself" as a conveyance on the expiration of the term fixed by the deed. See I. L. R, 8 Mad., 185.

„ 638. Add to the notes to art. 164 :

Time runs from the date of executing the *first* process, *e. g.*, attachment. See I. L. R., 7 All., 345.

„ 650. Para 2. Add :

An application for refund of the excess amount is governed by art. 178, and the right to apply accrues when the amount is ascertained, I. L. R., 7 All., 371.

„ 651. Para. 7. Add :

A sale in execution of a barred decree remains in force until it is set aside. See I. L. R., 11 Cal., 287.

Page 652. Para. 3. Add:

As to *which* decree should be executed, in cases where there has been an appeal from the original decree, see I. L. R., 4 All., 376, as explained in Gobardhan *v.* Gopal, I. L. R., 7 All., 366.

,, 656. Para. 2. Add:

According to the Madras High Court, an application for execution which does not comply with the requirements of sec. 235 of the C. P. Code, if returned for amendment, will give a new start, even if the decree-holder does nothing further upon it. I. L. R., 6 Mad., 250. But the Allahabad High Court do not concur in this view. An application which is dismissed at the request of the decree-holder, on the ground that the decree requires correction, is an application *withdrawn*. Such an application does not give the decree-holder a fresh start. I. L. R., 7 All., 359; I. L. R., 6 Bomb., 681.

When an application for *partial* execution is *granted*, and the order granting the application is not set aside in due course, the decree-holder *will get* a fresh start. I. L. R., 7 All., 282.

,, 657. Para. 3.

An application asking the Court to execute a decree (of the judgment-debtor's) which has been attached by the execution-creditor, is an application to take some step in aid of execution of the creditor's decree. I. L. R., 7 All. 382.

# LECTURE I.

## LIMITATION AND PRESCRIPTION.

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Law of Limitation and Prescription defined — Prescription according to the Code Napoleon — Another definition — Restrictive, exonerative, or exemptive prescription — Extinctive prescription — Negative prescription — Acquisitive, positive or affirmative prescription — Positive prescription distinguished from negative prescription — Prescription according to English lawyers in general — Acquisition by prescription distinguished from acquisition by occupation — The subject-matter of restrictive prescription, of acquisitive prescription, of extinctive prescription — The terms Prescription and Limitation as used here — Immemorial prescription — Prescription distinguished from the doctrine of presumption — The six significations of prescription — Tables shewing the several departments of prescription — The several modes of operation of this law in British India — Positive prescription how far recognized — Extinctive prescription how far recognized — Prescription recognized by the ancients and the moderns in general — The slow progress of the doctrine in England and British India — The law of the Romans — The Hindu law — Yajnyawalcya — Vyasa — Vrihaspati — Narada — Manu — Catyayana — The Mitakshara — Vrihaspati — Bombay Sudder Dewany Adawlat — Sir William Jones on the Mitakshara — Colebrooke on the same subject — Bengal Reg. II of 1805 — Sir T. Strange — Mr. (now Dr.) Markby.

Law of Limitation and Prescription defined.

A Law of Limitation limits the time at the end of which a suit, or other proceeding, cannot (subject to certain conditions) be maintained in a Court of Justice.

A Law of Prescription prescribes the period at the expiry of which a substantive right is (under certain circumstances) acquired or extinguished.

The term Prescription, as here used, excludes, and is opposed to, Limitation. It differs from Limitation

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in the same way, as one species differs from another species of the same genus. But in the French, Scotch, German, Spanish and other systems of law, which are descended from, or are assimilated to, the Roman or Civil Law, the term is used as the name of the genus itself, and as such it includes and comprises Limitation. In this generic sense, Prescription is defined by the Code Napoleon,[1] as a means of acquisition or of exoneration by a certain lapse of time, and subject to conditions determined by the law.[2] This definition considers Prescription from one point of view. It directs our attention to the person prescribing, that is, the person benefiting by prescription, and refers to his acquisition (of a right), or his exoneration (from a liability).

Prescription according to the Code Napoleon.

But Prescription supposes a contest of claimants,[3] a contest between the person prescribing and the person prescribed against. With reference to the person prescribed against, Prescription is a means of restricting, extinguishing, or (expressly) transferring rights, by reason of their being not used or availed of by their owner, or being adversely used or enjoyed by a stranger, for the period, and under the conditions, defined by law.[4]

Another definition.

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[1] Code Napoleon, Art. 2219.

[2] Similarly, Mr. Angell, referring to the Civil Code of Louisiana, says: "Prescription is either an instrument of the *acquisition* of property, or an instrument of an *exemption* only from the servitude of judicial process." (See Angell on the Limitations of Actions, para. 2.) The jurisprudence of the State of Louisiana, one of the United States, is fashioned on that of Spain.

[3] See Montriou's Institutes of Jurisprudence, p. 177

"Prescription is a mode of settling *disputed claims*."—Encyclopædia Brittanica.

[4] The term 'prescription,' I may observe, is sometimes employed with a

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Restrictive, exonerative, or exemptive prescription.

A right which is restricted or limited by prescription is not allowed to be actively enforced by an action, or other proceeding, in a Court of Justice. The judicial remedy is barred, but the (substantive) right itself survives[5] and continues to be available in other ways. Thus, the creditor may, even

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still wider signification. Taking the term with this very extensive meaning, the great German jurist Thibaut divides Prescription into I—Definite, and II—Indefinite; and subdivides Definite prescription into (1) Legal, (2) Judicial, (3) Testamentary, and (4) Conventional. Prescription is definite or indefinite according as the length of time required is exactly defined or not. A fixed number of days, months, or years from a determinable event (*e.g.*, from the accrual of the cause of action), or all the time from a fixed date (as from 1189 or 1765 A.D.) is a defined or definite period of time. But "time whereof the memory of man runneth not to the contrary," "a vast number of years" or "a long or a considerable period of time" is evidently indefinite.

Definite prescription is legal, judicial, testamentary or conventional, according as the period of prescription is set or prescribed by a law, a judicial decision, a will or an agreement. It is, however, not usual for English writers to distinguish prescription into legal on the one hand and judicial, testamentary or conventional on the other.

The definition of 'prescription' given above is a definition of definite legal prescription. (See Lindley's Translation of Thibaut's System des-Pandekten Rechts, pp. 171—175, and Appendix, p. cvii.)

[5] In so far as (restrictive) Prescription bars the remedy without extinguishing the right, it is a legislative violation of the general principle "where there is a legal right there is also a legal remedy" by suit or action at law, *ubi jus ibi remedium*. The judicial remedy or right of action is only a sanctioning or secondary right.

A law of limitation regarding the possession and dispossession of immoveable property (in the *absence* of a Statute fixing a *longer* period of *prescription*) generally extinguishes the (primary) right itself. In so far as it does this, it is *practically* a law of prescription. See Rambhat *v.* The Collector, I. L. R., 1 Bom., 592; Sitaram *v.* Khanderav, *ibid*, 286; Shibchunder *v.* Shibkissen, 1 Boulnois, 70; Gunga Govind *v.* The Collector, 7 W. R., 21, P.C.; 11 Moo. I. A., 345. Where the right is *not extinguished* by a particular Limitation Act, if the owner regains the property extra-judicially, he is remitted to his old title, and the party who held it adversely cannot recover it except under some special provision as that contained in sec. 9, Act I of 1877. See Rambhat *v.* The Collector, I. L. R., 1 Bom., pp. 598-9; and Lecture III, p. 65, note (8).

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after the expiration of the prescribed period, obtain payment of the money due to him, through the medium of any lien that he may hold on the property of the debtor.[6] Again, if a debt barred by lapse of time be discharged by payment, the payment cannot be recalled.[7] And a fresh promise made in writing, and signed by the debtor or his agent, to pay such a debt, is as binding as any other valid contract.[8] When a right is thus restricted or limited by prescription, the person subject to the corresponding duty (*i. e.*, the person prescribing) is exonerated or exempted from the liability to be sued or proceeded against in a Court of Justice. Restrictive Prescription or Limitation may, therefore, be also called Exonerative or Exemptive Prescription.

Extinctive prescription.

When a person's right is extinguished by prescription, he cannot assert it either judicially or extrajudicially. It ceases to exist so far as he is concerned. But as a mode of losing rights is often a mode of acquirng them, the (substantive) right is

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[6] Stephen's Commentaries, Bk. V., Chap. IX. Justice Pontifex, in Nursing *v.* Hurryhur (I L R., 5 Calc., 897, 899), says:—"If the creditor had a lien on the goods of his debtor on a general account, he would be entitled to hold the goods for a debt the recovery of which was barred by the Limitation Act. And probably it would be held that an executor would be allowed to retain out of a legacy a debt owing by the legatee to the testator, though its recovery was barred by the Act."

[7] Angell, para. 7. Sections 60 and 61 of Act IX of 1872 expressly allow the application of payments, under certain circumstances, to the discharge of time-barred debts Executors, administrators, and Hindu widows, in their representative capacities, are allowed credit for the payment of such debts. (Tillakchand *v.* Jaitmal, 10 Bom., 206; The Administrator-General *v.* Hawkins, I. L. R., 1 Mad., 267; Bhala Nahana *v.* Parbhu Hari, I. L. R., 2 Bom., 67; Lewis *v.* Rumney, L. R., 4 Eq, 451; and Banning on the Limitation of Actions, pp. 224-225.)

[8] The Indian Contract Act, 1872, sec. 25, cl. 3.

virtually (though not expressly or directly) transferred to the person claiming by prescription.[9] Where prescription extinguishes the (substantive) right itself, the remedy (whether judicial or otherwise) is necessarily lost or barred. Extinctive prescription, like Restrictive prescription, is based on the ground that the person entitled to the right has (negatively) abandond it, or (passively) neglected to avail himself of it, for the law-defined period. These two sorts of Prescription may be classed together under the head of "Negative prescription," which takes away the remedy or the right of a definite person, but does not positively confer on any one a right which he can enforce against the world.[10]

Negative prescription.

Where prescription not only bars the remedy, and extinguishes the right, of the party prescribed against, but directly and avowedly transfers his right

Acquisitive, positive, or affirmative prescription.

[9] Professor Bell of Scotland observes, that no right is extinguished by prescription "unless there be an opposite right in the course of being confirmed at the same time." The right which is said to be extinguished is not forfeited to the State or rendered ownerless. It vests in the opposite party. (See Montriou's Institutes, pp. 176-177.) This is probably the reason why the definition given by the Code Napoleon does not refer to the *extinction* of rights. *Acquisition* by prescription implies and involves the *extinction* of another's right.

[10] The distinction between positive and negative prescription (in respect of their *effects*) turns upon the nature of the evidence which it is requisite to give in order to enable the owner to recover the thing when detained by a stranger. It may be only necessary to show anterior possession in order to enable him to maintain an action; or to maintain an action it may be necessary for him to show his title. If it be necessary to show his title, then, unless a title may be acquired by prescription, he cannot sustain the action. But the right which he possesses under the Statute of Limitation would not enable him to maintain an action against a third party.—Austin's Lectures. Lec XXVII. Notwithstanding sec. 34 of 3 & 4 Will. IV., c. 27, it may be said that, in respect of corporeal things, positive prescription in its direct form is unknown to the English law.—*Ibid*, Lec. XXVI, notes by the editor, Mr. Robert Campbell.

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to the opposing claimant, the latter acquires a title against all the world. This translatory prescription has, accordingly, been called Acquisitive prescription. It is also termed *positive* or *affirmative* prescription, as opposed to *negative* prescription. It is positive or affirmative, because it not merely negatives[1] the right of the late owner, but positively affirms or declares that the adverse party has acquired that right by his active or positive enjoyment thereof, for the time, and under the conditions, prescribed by law. Negative prescription prevents the person prescribed against from asserting his right, and secures his adversary against any further claims on his part. Positive prescription secures to the prescriber the enjoyment of a right, by preventing others from disputing it after the law-defined term.

Positive prescription distinguished from negative prescription.

Lord Coke, it would appear, confines the term Prescription to acquisitive prescription only.[2] And most English lawyers use the term in a still more limited sense, *viz.*, as denoting that branch of acquisi-

Prescription according to English lawyers in general.

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[1] As the notion of extinctive prescription involves that of restrictive prescription, so the notion of acquisitive prescription involves that of extinctive prescription. In the words of Lord St. Leonards "there is a negative prescription even where a positive prescription also intervenes." The two are blended with each other.

[2] Lord Coke defines 'prescription' as the acquisition of title under the authority of law by length of time and enjoyment. "Prescription is a title taking his substance of use and time allowed by law." Coke upon Littleton, vol. i [114-*a*].

Pothier also defines 'prescription' as the means by which a man acquires the ownership of a thing through the peaceable and uninterrupted possession of it for a period of time determined by the law. (See Markby's Elements of Law, paras. 382 & 393.) In Phillimore's Private Roman Law, p. 125, 'prescription' is defined as "the right which, after undisputed possession of a thing for a time fixed by law, makes the thing so possessed our own."

tive prescription which deals with the acquisition of easements and other incorporeal heritable rights.

Acquisition by prescription distinguished from acquisition by occupation.

The acquisition of the right of ownership of a thing by prescription should be distinguished from a similar acquisition by occupancy or occupation. A thing which has no owner (*res nullius*) may be acquired by simple occupation or apprehension. No length of time is required to complete the title, nor is a contest of claimants or adverse possession possible under the circumstances. So, the prior appropriation of a new trade-mark may give an exclusive title to it, without the aid of prescription.[3] But acquisition by prescription supposes that the thing belongs to another (*res alicujus*), and that it is acquired after an adverse enjoyment or possession for a certain period of time.

The subject-matter of restrictive prescription.

Limitation or restrictive prescription, as such, does not affect the existence or continuance of substantive rights whether *in rem* or *in personam*.[4] It has for its immediate subject judicial remedies only.

[3] See *India Gazette*, 3rd December 1881, p. 1348; see also Ralli *v.* Fleming, 2 Cal. Law Rep., 94.

[4] Rights *in rem* are rights available against persons generally, *e. g.*, the right of ownership, a right of way or other easement, the right to one's good name, &c. All rights *in rem* are primary,—(*ibid.*) they exist independently of other rights, and are not founded on injuries, delicts or wrongs. Rights *in personam* are available against determinate persons only. Such rights may be primary as well as secondary or sanctioning. Primary rights *in personam* arise out of contracts or *quasi*-contracts. All sanctioning rights are rights *in personam*. They exist only for the sake of enforcing other rights, and arise out of breaches of contracts and *quasi*-contracts, torts or infringements of rights *in rem*, and crimes. Sanctioning rights cannot, of course, be acquired by prescription. A right of action, a right of re-capturing without resorting to action, a right of detention of a thing belonging to the debtor under certain circumstances, &c., are sanctioning rights. See Austin's Jurisprudence, pp. 45, *et seq.*; and Markby's Elements of Law, para. 140.

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—of acquisitive prescription.

Rights *in personam*, arising, as they do, out of contracts, *quasi*-contracts, or injuries, cannot, from their very nature, be acquired by prescription. Certain[5] rights *in rem*, such as rights of ownership of corporeal things, easements, and other incorporeal heritable rights constitute the subject of acquisitive or positive prescription.

—of extinctive prescription.

Extinctive prescription may operate upon rights *in rem*[6] as well as rights *in personam*.

Of the three species of prescription proper (that is, of definite legal prescription), two, the acquisitive and the extinctive, directly affect the substance of the right itself, and as such are included under the head of Substantive Law. In the title of these lectures the term Prescription denotes these two species, as opposed to the third,—namely, the restrictive,—which affects the form of the remedy only, and is a part of adjective or formal law.

The terms Prescription and Limitation as used here.

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|---|---|---|---|
| Prescription in its proper generic sense, *i.e.*, definite legal prescription. | 1. Acquisitive. | | I. Prescription as opposed to limitation. (A department of substantive law.) |
| | 2. Extinctive. | | |
| | 3. Restrictive. | | II. Limitation. (A department of adjective law.) |

Besides these kinds of prescription there is what

[5] A person's natural rights *in rem*, such as his right to reputation, his right to personal security, his right to unpolluted air, and his right to the water of natural streams, need not be acquired at all, and are not, so far, the subject of acquisitive prescription. Such rights require no age to ripen them.

[6] But the inborn or natural rights, which Blackstone calls 'absolute rights,' *viz.*, rights to personal security, liberty, and reputation, and the capacity to acquire rights of ownership, cannot obviously be extinguished by prescription.

Immemorial prescription.

is called an indefinite prescription. This does not depend particularly upon any express law. Immemorial prescription (which is a species of indefinite prescription) rests on the principle that a person who has enjoyed a right, from time whereof the memory of man runneth not to the contrary, must be treated and regarded as if he had acquired such right, by means of some valid transaction which can no longer be proved.[7]

Prescription distinguished from the doctrine of presumption.

Adverse enjoyment for a considerable[8] period of time, though it is proved that the enjoyment began within living memory, is often the basis of a similar presumption of some lawful and valid origin of the enjoyment. These presumptions frequently supply the place of prescription proper, but are distinguishable from it.[9] *First*, they do not directly make length of enjoyment a title in itself; *secondly*, they are not founded on any express and absolute rule of law; and

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[7] In addition to ordinary prescription "there is," says Vattel, "another called immemorial, because it is founded on immemorial possession, the origin of which is unknown or so deeply involved in obscurity as to allow no possibility of proving whether the possessor has really derived his right from the original proprietor or received the possession from another." "Immemorial possession is an irrefragable title, and immemorial prescription admits of no exception." (Law of Nations, Bk. II, Ch. XI.) The immemorial prescription of English law was originally indefinite, but by a judicial usurpation of legislative power, the time of legal memory has been fixed to be (the same as the limitation of real actions, by the Statute of Westminster, namely,) the commencement of the reign of Richard I, A.D. 1189. See Dalton *v.* Angus, 6 App. Cas., 811.

[8] Such period is indefinite. In the absence of an express law applicable to the particular case, Judges determine the period by analogy to the Statute of Limitation.

[9] English Judges have often been obliged to confound the distinction between the acquisition of a right under a definite rule of law by prescription, and the *inference* of right as a *fact* by evidence of possession. See Markby's Elements of Law, secs. 384*a* and 417.

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*thirdly*, while prescription assumes that the party prescribing had originally no right or title, or only an imperfect or an invalid one, "the doctrine of presumption goes on the footing of validity, and upholds validity, by supposing that everything was present which that validity required."[10]

From what has been already stated, it appears that the term Prescription has six[1] significations:

The six significations of prescription.

1*st.* It not only comprises definite legal prescription, but indefinite, judicial, testamentary and conventional prescription as well.

2*nd.* It denotes definite legal prescription, and includes not only acquisitive and extinctive prescription, but also restrictive prescription, or limitation.

3*rd.* It excludes limitation and signifies acquisitive and extinctive prescription.

4*th.* It is restricted to acquisitive or positive prescription.

5*th.* It is applied to that branch of acquisitive prescription which relates to the ownership of corporeal things.

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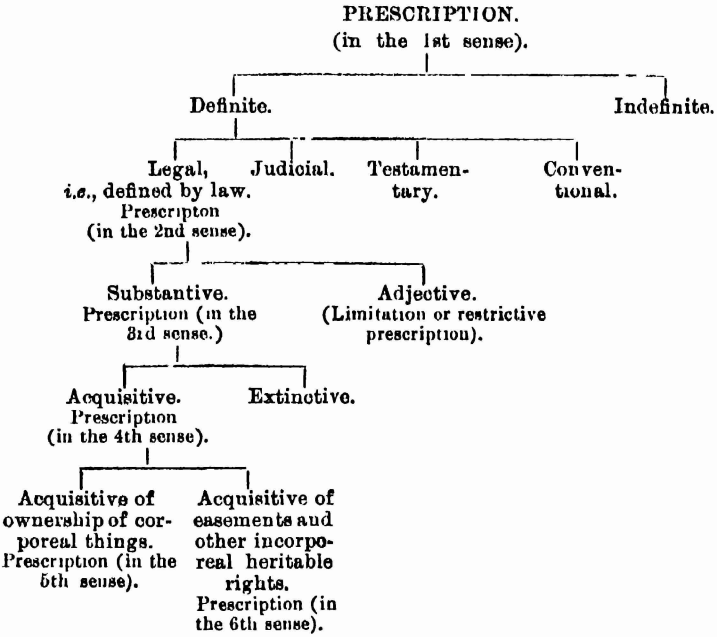
[10] *Per* Lord Westbury in Lee *v.* Johnstone L. R., 1 Scotch App., 426, 435. Even as regards restrictive prescription it may be observed, that the want of an express law is often supplied by (what the English Real Property Commissioners in their first Report, p. 39, call) a doubtful doctrine of presumption. See Banning on Limitation, p. 2.

Thus, when the English Statute of Limitation was not applicable to bonds and other speciality, an artificial presumption of payment from non-demand for twenty years was established by analogy to the Statute. Angell, para. 93.

[1] The six authorities for these six significations are: 1*st.*—Thibaut. 2*nd.* - Modern Civilians in general, and the Indian Law Commissioners' Special Report of the 26th February 1842. 3*rd.*—Sir James Colvile's Limitation Bills of 1855 and 1859. 4*th.*—Lord Coke. 5*th.*—The usucapio of the Romans. See also the definitions given by Pothier and Phillimore, *supra*. 6*th.*—Blackstone and English lawyers in general.

*6th.* It is limited to the acquisition of easements and other incorporeal rights.

The following table shows the several meanings of prescription :—




The Tables below show the several departments of prescription proper,—*i.e.*, of definite legal prescription :— Tables shewing the several departments of prescription.

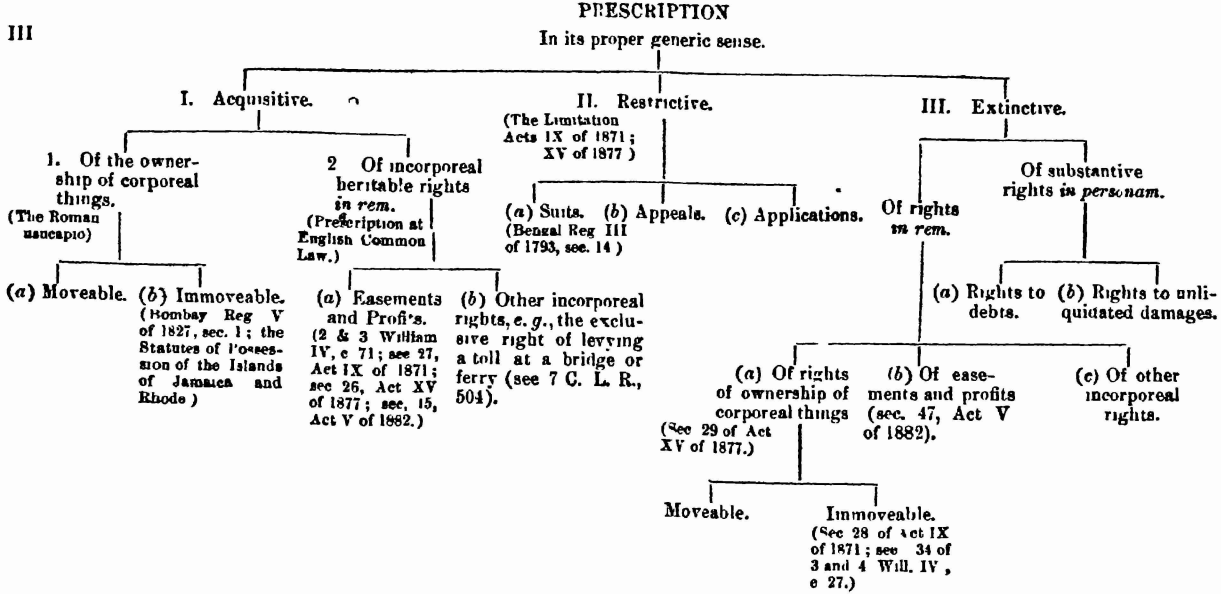
I.

| | | | |
|---|---|---|---|
| Prescription (using the term as the name of a *genus*). | 1. Prescription (using the term as the name of a *species*): | *a.* Acquisitive prescription. | Negative prescription. |
| | | *b.* Extinctive prescription. | |
| | 2. Limitation ... | Restrictive prescription. | |

II.

| | | | |
|---|---|---|---|
| Prescription in its proper generic sense. | 1. Positive (or affirmative) | Acquisitive or Translatory. | Prescription using the term as the name of a species. |
| | 2. Negative | *a.* Extinctive | Limitation. |
| | | *b.* Restrictive or Exemptive or Exonerative | |

III




*N.B.*—Easements and profits being fragments or constituent parts of the full right of ownership, the prescription of such rights may be called "constitutive prescription" as opposed to "translative prescription" which transfers the whole right of ownership. See Lindley's Thibaut, pp 171—175.

Criminal *prosecutions*, as well as civil *suits*, may be the subject of restrictive prescription. In England a special limitation of three years is applicable to prosecutions for treason and misprision of treason. See 7 Wm. IV, Ch. 3, sec. 5.

LECTURE I.

The several modes of operation of this law in British India.

In British India, the lapse of a definite period of time (under conditions determined by the law) operates in four ways :—

1. It restrains the holder of a right from enforcing his right by recourse to law ; in other words, it bars his remedy by active proceeding in court. *Vide* Section 4, Act XV of 1877.

2. It not only bars the remedy by action of an owner of property who has been out of possession, but extinguishes his right to such property. *Vide* Section 28, Act XV of 1877.

3. It extinguishes prescriptive and other easements, except where the easements are "necessary easements." *Vide* Section 47, Act V of 1882, which at present applies to the Madras Presidency, the Central Provinces, and Coorg.

4. It confers a right to light, air, way, watercourse, use of water, or other easement (from, over, or, upon another's land) on a person who has enjoyed it for the prescribed period.

The first is "Limitation" properly so called, and is included in negative prescription in its wider sense. The second and third fall under the head of Extinctive prescription, or of Negative prescription in its stricter sense. The fourth is a department of acquisitive or positive prescription.

Positive prescription how far recognized.

Of positive prescription, we had another instance in Bombay Regulation V of 1827, Section 1, which laid down that thirty years' adverse possession of immoveable property was to be deemed conclusive proof of proprietary right in the possessor, except in cases of fraud. Although this Regulation did not, in

LECTURE I. so many words, translate or transfer the right of the original owner of the property to the person in possession of it, it used distinct language to indicate that, when the thirty years had expired, the right of property should be regarded as vested in such person;[2] and Sir James Colvile, in giving the judgment of Her Majesty's Privy Council in *Moharana Fatesanji* v. *Desai Kalianrai*,[3] did not hesitate to describe the first section of the Regulation as an enactment of positive prescription.[4]

In Bengal it was held, even before the Limitation Acts of 1871 and 1877 came into operation, that a twelve years' possession of immoveable property by a wrong-doer extinguished the title of the rightful owner, and conferred a good title upon the wrong-doer.[5] But as Regulation III of 1793, Section 14, and Act XIV of 1859, Section 1, clause 12, in terms limit the suit only, and as Act IX of 1871, Section 29, and Act XV of 1877, Section 28, extinguish the title only, and as none of them directly and avowedly transfers the right of ownership to the adverse holder, these

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[2] Sitaram Vasudeva v. Khanderav Balkrishna, I. L. R., 1 Bom., 286, A. C.

[3] L. R., 1 I. A., 84, 51 C. S. C., 21 W. R., 178, 181; 10 Bom., 281, 288.

[4] But when the Limitation Bill was discussed in Council in 1859, Mr. Peacock (afterwards Sir Barnes Peacock) was of opinion that the Bombay Regulation "did not enact a law of positive prescription, but only, for the most part, a rule of evidence." See the Proceedings of the Legislative Council of India for 1859, p. 54.

[5] Kalikishore Roy v. Dhananjoy Roy, I. L. R., 3 Calc., 224, and the cases therein referred to. See also Golam Russool v Mussamut Mughlo, 1 Moo. I. A., 446; and 2 W. R., 386; 10 W. R., 61; 12 W. R., 192; Rambhat v. The Collector, I. L. R., 1 Bom., 592. This, however, was not the rule in the Bombay Presidency, where they had an express Law of Prescription, which was not repealed until 1871. (*Vide* Section 2, Act IX of 1871.)

sections, strictly speaking, are not laws of positive prescription.[6]

LECTURE I.

Extinctive Prescription how far recognized.

It should be also observed that the Indian Law of Limitation and Prescription does not in terms extinguish any right other than the right to (corporeal) property and the right to easements. As to rights *in personam*, it has been held, that a right to receive payment of a debt does subsist even after the remedy by action has been barred.[7] Such a right is, therefore, not a subject of extinctive prescription in British India. There is no express ruling to the effect that a right to unliquidated damages arising out of a breach of a contract or a tort is extinguished by the Indian Law of Limitation. But the theory now most prevalent is, that the bar of the action on a *personal* right and the extinction of the right are coincident.[8]

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[6] That is, positive prescription in its *direct* form. See Austin's Jurisprudence, by Campbell, Vol. I, p. 509, note.

[7] Mohesh Lal *v.* Sumpat Koeri, I. L. R., 6 Calc., 340; S. C., 7 C. L. R., 121, and the cases therein referred to.

[8] Valia Tamburatti *v.* Vira Rayan, I. L. R., 1 Mad., 228, *per* Holloway, J. It is said that, "wherever physical possession is possible, the right *to the thing* is distinguishable from the right of *action*. But in a claim on contract or tort, the law has not to choose *to whom* it will give the right, but whether it will give the right, and the right when given is good only against the contractor or tort-feasor. Here the right of action is the whole of the right, and when the action is gone, there is no obligation left." (Westlake's Private International Law, p. 251, Ed. of 1880.) But it may be observed that even the inchoate right to *unliquidated* damages may be the subject of accord and satisfaction, and though such right is not fully ascertained till the damages are assessed by a Court of Justice, it is yet a substantive right, quite distinct from the action by which it is judicially enforced. (See Addison on Torts, p. 959, and Stephen's Commentaries, Bk. V., Ch. VII.) Westlake's remarks, however, apply to an action by an informer for a penalty upon a Statute. The informer has no right independent of his action. See Darby and Bosanquet on the Statutes of Limitation, pp. 427-8.

LECTURE I.

Prescription recognized by the ancients and the moderns in general.

Prescription in some form or other was recognized by the Athenians, the Romans, and the Hindus, but not by the Jews,[9] the Mahomedans,[10] and the ancient Scots.[1]

In modern times the doctrine has been adopted to some extent or other by almost all civilized nations, although, as observed by Sir Henry Maine,[2] the moderns (specially those whose jurisprudence is not based on the Roman law) have been loath to carry it to its legitimate consequences. Thus, in England, legislation long declined to advance beyond the imperfect device of barring actions for the recovery of land or other real property, when the cause of action had taken place earlier than a *fixed point* of time, such as the commencement of the reign of Henry I, the return of King John from Ireland, and the coronation of Richard I. It was not until the 32nd year of Henry VIII, as to real actions, and the 21st

The slow progress of the doctrine in England and British India.

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[9] See Angell on the Limitations of Actions para. 8. By the Jewish law all lands not in the hands of the original owners were, with certain exceptions restored to them in the jubilee year, which recurred every fiftieth year. Lev. xxv. Debts were remitted at the jubilee

[10] See Macnaughten's Principles and Precedents of Mahomedan Law, p. 76, Ch. XV. Sec. 5.

In the Bûarurayik an opinion is cited from the Mabsut, to the effect, that if a person causelessly neglect to advance his claim for a period of thirty-three years, it shall not be cognizable in a Court of Justice; but this opinion is opposed to the legal doctrine. Even as to the right of pre-emption, according to Abu Hanifa and one tradition of Abu Yusof. there is no limitation as to time. This rule is maintained in the Fatwa Alamgiri and in the Hedaya, and it seems to be the most authentic and generally prevalent doctrine. Bourke's Indian Law of Limitation, 3rd Ed., pp. 6-7; Cal. S. D., 1851, p. 292, Mahamud Danish *v.* Choora Gazee.

[1] Lord Stair, in his Institutions (Bk. II, tit. 12), says: "Prescription had no place in the old customs of Scotland."

[2] Maine's Ancient Law, pp. 284-285.

year of James I, as to personal actions, that the English people obtained statutes which fixed certain (in lieu of daily increasing) periods of limitation "both for the time present and for all times to come." The Statute of James I (1623), which applied to actions for ejectment as well as to purely personal actions on torts and simple contracts, barred the remedy, but did not extinguish the right. The subsequent Statute of William IV (1834) extinguishes the right as to real property after twenty[3] years' adverse possession, but it does not even in that limited class of cases expressly transfer the right to the adverse holder. In British India, an express law of positive prescription was attempted to be introduced by Sir James Colvile in 1859, and by Sir James Fitz James Stephen in 1871, but Act XIV of 1859 and Act IX of 1871 were passed only after the clauses relating to positive prescription had been expunged from the Bills as introduced. The Act of 1871, however, contained an extinctive clause similar to that in the Statute of William IV. The last Limitation Act (XV of 1877) extends the rule of extinctive prescription to moveable property, but even this does not contain any express law of translatory prescription.[4]

The Athenian laws in general prohibited all actions where the wrong had been committed six years

[3] The 37 and 38 Vict., c. 57, which came into operation in 1879, reduces the *period* of limitation to twelve years, and so far assimilates the law of England to that of British India.

[4] The 2 and 3 Will. IV., c. 71, and Acts IX of 1871 and XV of 1877, enact rules of *constitutive* prescription, *viz.*, rules for the acquisition of *easements*.

LECTURE I.

The law of the Romans.

before the institution thereof.[5] Instances of all sorts of prescription, whether positive, extinctive, or restrictive, are to be found in the Roman law, which, as we have observed, is the basis of several modern systems of law. The doctrine of limitation (as to immoveables in the provinces) was recognized under the name of *Præscriptio*,[6] and the principle of positive prescription (as to immoveables in Italy, and as to all moveables) under the name of *usucapio*. In the time of Justinian *usucapio* and *præscriptio* were amalgamated, and it was provided that the property in things moveable was acquired by the *bonâ fide* use of them for the period of three years, and that in things immoveable by long *bonâ fide* possession, that is, ten years for persons living in the same province, and twenty years for persons living in different provinces, and this in Italy as well as in the provinces.[7]

Usucapion was not (at least after A. U. C. 720) applicable to the acquisition of easements, but a long

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[5] Angell. s. 8. Blackstone says, the period was *five* years. See Stephen's Commentaries, Bk V, Ch. IX.

[6] The present use of the term Prescription is un-Roman. That which was known to the Romans as usucapion has descended to modern jurisprudence under the name of Prescription *Præscriptio* was so called, because the objection of limitation was *written before*, that is, placed at the *beginning* of the directions which the *Magistratus* (Judge of questions of law) sent to the *Judex* (Judge of questions of facts) for the purpose of limiting the enquiry. See Maine's Ancient Law, 284, and Sandar's Justinian, Introduction.

[7] The twelve tables of Rome fixed one year and two years as the periods within which actions to recover possession of moveables and immoveables, respectively, were required to be instituted. After the expiry of this limited time, the right of the original owner was extinguished in favor of the party in *bonâ fide* possession of the property. See Justinian's Institutes, Bk. II. title 6.

user of easements gave rights which were protected. Ten years' non-user for those present, and twenty years' non-user for those absent, also extinguished an easement.[8]

Certain prætorian actions were barred by one year's limitation; but all other actions, real or personal, could originally be brought at any length of time, until Imperial Constitutions assigned a limit of thirty years to most actions, and of forty years to some. The effect of the lapse of time in these cases was to bar the action, while its effect in cases to which usucapion applied was to transfer the property.[9]

The Hindu law.

The following are some of the texts which relate to prescription and limitation under the Hindu Law :—

Yajnyawalcya.

(*a.*) "He who *sees* his land possessed by a *stranger* for twenty years, or his personal estate for ten years, without asserting his own right, loses his property in them — except pledges, boundaries, sealed deposits, the wealth of idiots and infants, things amicably lent for use, and the property of a king, a woman, or a priest versed in holy writ."—Yajnyawalcya.[10]

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[8] Sandar's Institutes of Justinian, p. 215. Dalton v. Angus, 6 App. Cas., 819, Lord Blackburn's judgment.

[9] Sandar, pp. 575-576.

"There was also a prescription termed *longissimi temporis*. If there was a possession for thirty years, or in the case of ecclesiastical property, for forty years, whatever vitium or obstacle there might be to the acquisition by use, for instance, theft, violence, absence of *justa causa*, or *mala-fides*, the possessor could, before the time of Justinian, repel actions brought to claim the thing, and after his legislation, became the legal owner." *Ibid*, pp. 236-7.

[10] See Colebrooke's Digest, Ed. of 1797, Vol. I, p. 190. On a Bombay case decided in 1807, Mr. Colebrooke remarks :—"Certainly ten years is

LECTURE I.

Vyasa.

(*b.*) "Occupancy during twenty years, unmolested by the owner, is considered as possession of land during one generation; twice as much during two; thrice as much during three; and in this instance proof of a fair title is not required."—Vyasa.[1]

Vrihaspati.

(*c.*) "A possession by *strangers* for three generations gives no doubt an absolute title; not a possession by *kinsmen* within the degree of Sapindas; the property of a house, arable land, a market or other immoveables, which are possessed by a friend or a near kinsman in the male or female line, who is not the proprietor, shall not be lost to the rightful owner. Nor shall the husbands of daughters, nor learned priests, nor the king, nor his ministers acquire a title even by a very long and quiet possession."—Vrihaspati.[2]

Narada

(*d.*) "The *suit* does not prosper after the expiration of the limited period of a person practising indifference and remaining silent."—Narada quoted in the Mitakshara, chap. iii, sec. 3.[3]

Manu

(*e.*) "If he be neither an idiot, nor an infant under the full age of 15 years, and if the chattel be adversely possessed in a place where he may see it, his property

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the shortest limit of action known to the Hindu law, and this remark is assented to by Mr. Ellis. See 2 Strange's Hindu Law, 465."

Sir Thomas Strange erroneously treats this text of Yajnyawalcya as an authority for the conclusion that "the period within which an action must be brought for the recovery of a *debt* is ten years." (See Beer Chand Poddar *v.* Roma Nath Tagore, Taylor and Bell, 131.)

[1] See Colebrooke's Digest, Vol. IV, p. 143. Raghunandan, commenting on this text of Vayasa, says: "This precept relating to usucapion in the *absence* of the proprietor, does not contradict the texts relating to adverse possession during twenty years in the *presence* of the owner." Colebrooke's Digest, Vol. IV, p. 144.

[2] See Colebrooke's Digest, Vol. IV, p. 144.

[3] See Macnaughten's Principles and Precedents, Vol. I, p. 203.

in it is extinct by law, and the adverse possessor shall keep it."—Manu.[4] LECTURE I.

(*f.*) "In cases extending beyond the memory of man, the hereditary succession of three ancestors is admitted (as evidence of landed property) even without a title."—Catyayana quoted in the Mitakshara, chap. iii, sec. 5.[5] Catyayana.

(*g.*) "Possession for upwards of a hundred years, hereditary, uninterrupted, and falling under the observation of the adverse party, confers a right as it forms a presumption of, from its conformity with, a title."—Mitakshara, chap. iii, sec. 5.[6] The Mitakshara.

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[4] See Macnaughten's Principles and Precedents, Vol. I, p. 204.

[5] *Ibid.* pp. 213-4. The extreme age of man, according to the Vedas, being 100 years, the period of 100 years is "within the memory of man."—*Ibid.*

[6] Macnaughten's Principles and Precedents, Vol. I, p. 214. The presumption appears to be a rebuttable one, for although, according to the Mitakshara, it arises where there is no demonstrable title, it does not arise where there is proof of *absence* of title.—*Ibid.*

Narada (quoted in the Mitakshara, chap. iii, sec. 3) declares:—"He who enjoys without a title even for many hundred years,—the ruler of the earth should inflict on that sinner the punishment of a thief." (See Macnaughten, Vol. I, p. 202.) This sloka is attributed to Manu by Colebrooke, see 2 Strange's Hindu Law, pp. 20-21.

It would appear that, according to the Mitakshara, the *first* intruder, who asserts possession, *without mention of title*, is punishable,—not his son or grandson. (See Montriou's Institutes of Jurisprudence, pp. 183, 184.)

Vijnaneswara attempts to reconcile this text of Narada, so far as it relates to the first intruder, with that of Yajnawalcya, by holding that if the *produce* of the property is not forthcoming, but has been consumed or destroyed, it shall not be recovered after the twenty years, but the property itself may be recovered at any time, if it can be *proved* that the adverse holder had *no right* to the property,—*i.e.*, had not legally acquired it. (Macnaughten's Principles and Precedents, Vol. II, pp. 205-206.)

The Vyabahara Mayukha (Chap. II, sec. 2, Mandalik's translation, p. 21) says: this text of Narada is applicable to cases where the memory of a

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LECTURE I.

Vrihaspati.

(*h.*) "In immoveable property obtained by an equitable partition or by purchase, or inherited from the father, or received from the king, a title is gained by long possession, and lost by silent neglect. Even in property simply obtained (with or without a fair title), which a man has accepted and quietly possessed unmolested by another, he acquires a title, and in like manner he forfeits one by (silent) neglect."—Vrihaspati quoted in Colebrooke's Digest, Vol. IV, p. 332, verse 384.[7]

The text of Narada (*d*) recognizes the principle of restrictive prescription, or limitation. The text of Yajnawalcya (*a*) upholds the rule of extinctive prescription as regards moveable and immoveable property. The texts of Vyasa (*b*), Vrihaspati (*c*) and (*h*), Manu (*e*), Catyayana (*f*), and Vijnanesvara (*g*), sanction the doctrine of acquisitive prescription in respect of corporeal property. The Mitakshara does not clearly distinguish prescription from the doctrine of presumption.

The following is a tabular statement of some of the provisions of the Hindu law of prescription as to

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want of title is handed down by tradition,—*i.e.*, where there is proof of absence of title.

Vattel takes a similar view of immemorial prescription, where he says that it affords a legal presumption "*as long as* the adverse party *fails* to adduce substantial reasons in support of his claim." (Law of Nations, Bk. II. Ch. XI.)

Jagannath and Raghunandan, of Bengal, do not seem to take notice of this text of Narada.

[7] According to Jagannath Tarkapanchanan even a *notorious* fair title, *i.e.*, a title accompanied by possession, may be lost by subsequent dispossession for twenty years, &c. The other portion of this text of Vrihaspati would seem to apply where the holder of the title never obtains possession.

land, with their analogues in some other well-known system or systems :

| | | |
|---|---|---|
| Period of prescription *inter presentes*, shorter than the period of prescription *inter absentes*. | Texts (*a*) and (*b*) as interpreted by the Bengal lawyer Raghunandan. (The Mitakshara does not admit any prescriptive right in the absence of the adverse party.) | Justinian's Institutes, Bk. II Tit. 6. The English law exception (before 1879) in case of plaintiff's absence beyond seas. 3 & 4 Will. IV, c. 27, secs. 16, 19. |
| Distinction between possession with and without a fair title. | Text (*b*) and text (*h*). | The *præscriptio longissimi temporis* of the Romans Article 2262 of the Code Napoleon. Beng. Reg. II of 1805, sec. 3. |
| Right to land extinguished after twenty years' adverse possession. | Text (*a*) as interpreted by the Bengal school. | 3 & 4 Will IV, c 27, sec. 34. (The period has been reduced to twelve years by 37 & 38 Vict., c. 57.) |
| Exception in favor of pledges and deposits. | Text (*a*) ... ... | Beng. Reg. II of 1805, sec. 3, cl. 4. (This has been modified by the Indian Limitation Acts of 1859, 1871 and 1877.) |
| Exception in favor of infants, idiots, and women. | Texts (*a*) and (*e*) ... | 3 & 4 Will. IV, c. 27, sec. 16. Sec. 11, Act XIV of 1859. (Under the old Roman law, as under the Hindu law, women were always under tutelage In England, married women only are excepted.) |
| Exception in favor of the king and the priest. | Text (*a*) ... ... (Under Hindu law the king and the priest were also *precluded* from taking *advantage* of the rule of prescription.) | The maxim *nullum tempus occurrit regi aut ecclesiæ*, which was not abrogated in England as to the crown, until 1623 and 1769, and as to the clergy until 1834. |
| Exception against friends and kinsmen. | Texts (*a*) and (*e*) ... | The principle that trustees and persons holding permissively cannot prescribe against the owner, recognized by the English and Indian law. |

The Hindu law of prescription, so far as it affects

LECTURE I.

Bombay Sudder Dewany Adawlat.

immoveable property, is thus summarized in the case of Sayud Ghoolam Ruza *v.* Aja Bhaee and others :[8]—"If the owner of real property, whether land or other, allow another to hold it for three generations, under any deed, without claiming it, such property becomes lost to him, and ownership accrues to the person in possession. But as three generations may lapse in two or three years, it is provided by the Shastras that the actual possessor's ownership shall ensue if the property has been held for any time after the *smartha kal* (the memory of man). In the Mitakshara this *smartha kal* is fixed at 100 years ; however Catayana and Vyasa state sixty years as the time when three generations may be said to have passed over, and after which the claim of the original proprietor is null under any plea."

Sir William Jones on the Mitakshara.

Sir William Jones, in a letter to the Governor of Bombay, writes, that the doctrine of the Mitakshara is, that "an absolute property may be acquired in law by continued and undisputed possession for twenty years in the *presence* of the owner, provided that the possessor came in by a fair title, either by descent or by purchase ; if he had no fair title, the intermediate profits only are irrecoverable, but the property is not lost." And he concludes: "I only add for your further satisfaction, that if three descents have happened since the first possession without a fair title, the property is lost, even though the owner was *absent;* but if three descents have not been cast, an adverse possession for a hundred years gives an absolute property in

[8] Borradaile's Reports, p. 367 (Bombay Sudder Dewani Adawlat).

the land to the possessor, unless the owner was under some legal disability."[9]

Colebrooke on the same subject.

Colebrooke's remarks on this subject are more accurate, he says:[10] "Vijnanesvara, after a long argument, rules that it is the *perishable produce* only of land that cannot be recovered after the expiration of twenty years, and of other property after ten years, such land or other property having been enjoyed to the exclusion of the owner by his default or in his view. With regard to land he holds, that if legal acquisition can be *disproved* even after the expiration of a hundred years (considered as the measure of the life of man) ownership is not established by possession, and he accordingly declares that 'even beyond the period of memory, if there exist a current tradition of the illegality of the acquisition, the enjoyment is not valid.' And it is observable that, to render it so in any case, it must have been in view of the owner. In fact, according to the original and correct doctrine of the Hindu law, enjoyment or possession can never be cause of ownership, it is a presumption of it only; but if the want of original title can be shewn, the possessory holder may at any time be divested of the property. This applies not merely to land, but to property of every description."

Beng. Reg. II of 1805.

The preamble to Bengal Regulation II of 1805 recites, that, under the Hindu law, a sixty years' prescription is applied to private rights and claims, in

[9] See the Indian Law of Limitation, by W. M. Bourke, 3rd Ed., Appendix, p. xvi, where these passages are quoted from the official notes of Sir Robert Chamber, C. J.

[10] See 2 Strange, p. 20.

LECTURE I.

cases of unmolested possession, unless there be proof of a bad title; and that the distinction between *bonâ fide* possession under a title believed by the possessor to be good and sufficient, and *mala fide* possession obtained by fraud or violence, has been taken in the Hindu law, as in the laws of other countries, wherein long and peaceable possession is held and admitted to establish a right of possession and property.

Sir T. Strange.

Sir Thomas Strange distinctly asserts that, for the recovery of debts or other personal matters, actions must be brought within ten years, but it has been held that all the texts quoted by him refer to adverse occupation of a thing *capable of occupancy*, and have no application to debts. "No prescription of the right, nor yet of the remedy in such cases, is derivable from the authority of any text-writer on the Hindu law."[1]

Mr. (now Dr.) Markby.

"The Mitakshara lawyers," says Mr. Markby in his Elements of Law (Appendix B, p. 267), "would, I think, only have allowed twenty years' possession to cure a defect of title, if the party held under a title which was just. Jagannath, on the other hand, as understood by Colebrooke, dispenses with the requirement of a just title, but there he does not give any fixed period for the acquisition of ownership, which would probably, therefore, be shortened in favor of the honest purchaser. There is much to be said in favor of the good sense and justice of the rule which gives ownership to the person in possession after a

[1] Beerchand Poddar *v.* Romanath Tagore, Taylor and Bell, p. 131 (1819), Calcutta Supreme Court.

certain period in all cases, but shortens that period in favor of those who have got into possession in good faith, though on a defective title. This was the Roman law, and is the prevailing law of Continental Europe; and the rule of Hindu law, as recognized and applied by the more enlightened school, did not probably differ materially from it. The objection to the English law is, that it does not take sufficient notice of the distinction between a holding by wrong and a holding under a defective title, but gives the same fixed period of prescription for nearly all cases."

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# LECTURE II.

## THE REASON AND THE OBJECT OF THE LAW OF LIMITATION AND PRESCRIPTION, AND THE *CLASS* OF LAWS TO WHICH IT BELONGS.

Reasons of public policy — The quieting of titles, &c. — *Interest republicæ ut sit finis litium* — The perishable nature of man and all that belongs to him renders limitation necessary — This law—a means of ensuring *private* justice as well — Occasional injustice how justified — *Vigilanti bus, non dormientibus jura subveniunt* — The theory of laches or acquiescence — The true foundation of prescription, public utility and convenience — The theory of satisfaction or release — Different laws in different countries, and in different times — The principle on which the length of the periods of prescription is determined — According to Vattel the law of limitation and prescription is a part of the law of Nature and the voluntary law of nations — According to Lord Stair, it is a positive law — According to Thibaut, it is *jus singulare* — Lord Blackburn follows Lord Stair — The law of limitation and prescription is public law, as opposed to provisional law — Laws of prescription and limitation are general private laws, substantive and adjective — The law of limitation a *lex fori* — The *lex fori* preferred to foreign law in matters of procedure — The same rule applies whether the foreign law allows a shorter or a longer period — The conditions on which a foreign law of limitation may be preferred to the *lex fori* — Limitation is not "of the nature of the contract" — Otherwise, when the bar extinguishes the right — When the *lex fori* and the *lex loci contractus* are both applicable — The personal law of the Hindus and Mahamedans yield to the *lex fori*.

Reasons of *public* policy.

THE main consideration on which the doctrine of limitation and prescription is founded is *public policy*. "Usucapion," says Gaius (Digest, Bk. XLI, tit. 3, art. 1), "was introduced for the public good, *viz.*, lest ownership of sundry things be left uncertain for a long time and often for ever: seeing that a fixed period would suffice for the diligence of own-

ers." "Prescription," said Wayne, J., "is a thing of policy growing out of the experience of its necessity.[2] "Prescription," wrote Lord Stair (Institutions, Bk. II, tit. 12, s. 9) "is founded upon utility more than upon equity."

The quieting of titles, &c.

To secure the quiet and repose of the community, it is necessary that the title to property, and matters of right in general, should not be in a state of constant uncertainty, doubt, and suspense.[3] The law of limitation and prescription prevents this uncertainty. It not only quiets disputes between individuals, but in the interests of the public declares that the possession of property for a certain length of time is directly or indirectly a good title. A person who has been long in possession acquires a credit which is attributable to such possession, and it is of great importance to the public that his possession should not be lightly disturbed.[4]

Unlimited and perpetual litigation disturb the peace of society, and lead to disorder and confusion. A constant dread of judicial process and a feeling of insecurity retard the growth or prosperity of a nation, and labor is paralysed when the enjoyment

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[2] See Story's Conflict of Laws, para. 582a.

[3] See Domat's Civil Law, L. 8, T. 7, s. 4; Puffendorf, Bk. IV, chap. xii, s. 6.

[4] See Brown on The Law of Limitation as to Real Property, p. 14. Professor Amos, in his Systematic View of the Science of Jurisprudence (p. 346), mentions the following as one of the grounds on which the doctrine of prescription is based: "The expediency of not disturbing the existing state of things in view of Public Expectation being based on their continuance, and not on their disturbance." Prescription is "Conducive to the *public* security and the quieting of disputes."—Bom. Reg V of 1827, preamble.

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of its fruits is uncertain.[5] Moreover, where stale claims leave the Courts little or no time to attend promptly to more recent and urgent cases, creditors and injured parties in general are led to suspect the readiness of the State to enforce their rights. It is therefore expedient that the possibilities of litigation should be limited and restricted. The old maxim of law is *Interest reipublicæ ut sit finis litium.*[6] The interests of the State require that a period should be put to litigation.

*Interest reipublicæ ut sit finis litium.*

The law of limitation and prescription prescribes this limit. It prevents persons from enforcing their own rights, and disputing the rights of others, after a certain period of time, and thus quiets titles, facilitates transfers,[7] and enhances the value of property. It enables men to reckon upon security from further claim and to act upon it.[8]

The perishable nature of man and all that belongs to him renders limitation necessary.

The necessity for putting a limit to litigation arises also from "the perishable nature of man and all that belongs to him."[9] It has been said by John Voet that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal.[10] The death of parties and witnesses, the loss or destruction of documents, and the fading of memory, in the course of time, render such a limit

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[5] See Angell on Limitations, Chap. i, s. 9.

[6] See Ruckmabye *v.* Lulloobhoy, 5 Moo. I. A., p. 234.

[7] This law enables us, at least partially, "to abridge the length of abstracts and to simplify the deduction of titles." Banning, p. 4

[8] *Per* Markby, J., in Krisna Mohun Bose *v.* Okhil Money Dassi, I. L. R., 3 Calc., 331.

[9] Phillimore's Private Roman Law, p. 125.

[10] See Story's Conflict of Laws, *Prescription*, and Brown on Limitation, p. 10.

highly expedient. "Time," said Lord Plunkett, Lord Chancellor of Ireland, "holds in one hand a scythe, in the other an hour-glass. The scythe mows down the evidence of our rights, the hour-glass measures the period which renders that evidence superfluous."[1] The law of limitation and prescription "repairs the injuries committed by time," and ensures justice by supplying the deficiency of proof.

This law—a means of ensuring *private* justice as well.

A Statute of limitation and prescription is not only a statute of public peace and repose, but it is at the same time a means of ensuring private justice, suppressing fraud and perjury, quickening diligence and preventing oppression.[2] It is unfair to call upon a person to defend an action at a time when his muniments of title, acquittances or other documents are (very likely) lost or destroyed, and when he cannot be expected to produce the witnesses necessary to support his case or to meet the charge made against him.[3] If claims might be postponed to an indefinite period, the Courts would have the utmost difficulty in ascertaining the truth of facts, and in confuting fraud and perjury.[2] Experience shows that fraud and perjury have a better chance of success, when the staleness of the claim renders the preservation of the evidence relating to it less probable.[4] Justice to the defendant requires that the plaintiff's

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[1] See Mr. Stoke's Speech in the Legislative Council, 19th July 1877.

[2] Story's Conflict of Laws, s. 576, see also White *v.* Paruthers, 1 Knapp's Privy Council Reports, p 179 (227).

[3] Battley *v.* Faulkner, 3 Barn. and Ald., 288, 293, referred to at p 5 of Shephard on Limitation. See also Chhaganlal *v.* Bapubhae, I. L. R., 5 Bom., 68 (72).

[4] Westlake's Private International Law, Ed. of 1880, p. 252.

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want of diligence should be discouraged as much as possible. It is extremely hard to dispossess parties who have long been in quiet enjoyment of property, unconscious of any defect of title, and with habits and plans of life influenced by the income which the property produces.[5] And to enforce the payment of a debt, which time and misfortune have rendered the debtor unable to discharge, and which he was led to believe would never be demanded, savours more of cruelty than of justice.[6]

Occasional injustice how justified.

But does the law ensure justice in every case? Does it not, on the other hand, offer a premium to persistence in wrong? The answer to these questions is, that the law aims at the greatest good of the greatest number, and "is based on that compromise between occasional wrong and general right which is inseparable from the condition of a finite being."[7] The legitimate object of the law is not to favor usurpers or to enable debtors to escape payment of their debts, but to quiet long continued possession, and to protect persons who have long enjoyed a right or an immunity, from being harassed by stale demands. The law designs to protect these persons

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[5] White *v.* Paruthers quoted above.

[6] A'Court *v.* Cross, 3 Bing. R., 329, cited in Angell on Limitations, Chap. I, s. 11.

"The principle on which the law (of limitation as to debts) has always been based is either actual satisfaction, or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay." (*Per* Jessel, M. R., in Sutton *v.* Sutton, 22, Ch. Div., 511).

Many of the subsidiary reasons urged in support of the doctrine of prescription apply with full force to "Prescription of long standing" only.

[7] Phillimore's Private Roman Law, p. 126.

from claims brought forward against them at a period, when it might be presumed from the lapse of time that the claims are either fictitious or that they had been satisfied or abandoned. Honest parties, who have not really abandoned their claims, may sometimes suffer loss by reason of this law, but it is nevertheless expedient that the general good of the community should be purchased at the expense of some individual hardship. It is better perhaps that occasional injustice should be permitted, than to run the risk of doing greater injustice by entering into the consideration of transactions, which the distance of time may perhaps render incapable of a satisfactory explanation.[8] This individual mischief is further justified on the ground that a party who is insensible to the value of civil remedies, and who tacitly acquiescing in the conduct of his opponent, does not assert his own claim with promptitude, has little or no right to require the aid of the state in enforcing it.[9] *Vigilantibus, non dormientibus jura subveniunt.* The law assists the vigilant, not those who sleep over their rights. Lord Blackburn, in a recent case, points out that this ground of acquiescence or

*Vigilantibus, non dormientibus jura subveniunt.*

[8] *Per* Richards, C. B., see Brown on Limitation, p. 12.

[9] See Montriou's Institutes, p 174; White *v.* Paruthers, 1 Knapp's Rep., 179; and Adnam *v.* Earl of Sandwich, 2 Q. B. Div., 489.

"Although," as Puffendorf observes, "the principal aim of the law is not to punish men's defaults," the effect and consequence of this law is sometimes penal. This penal result is justified by a consideration of the laches and negligence of the claimant. The law avoids the greater of two evils, and sees that the lesser evil falls on the party who is himself to blame for it. It is not intended that persistence in wrong should engender a right or exempt the wrong-doer from liability; but it being expedient to protect all persons who have long enjoyed a right or an immunity, the law unavoidably protects some wrong-doers.

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The theory of laches or acquiescence.

laches is often spoken of as if it were the only ground on which prescription was or could be founded.[10] But the weight of authority in England and in other systems of jurisprudence shews that the principle on which prescription is founded is more extensive.[1] No doubt it seems far less hard to say that enjoyment for a prescribed time shall bar the right-holder, when he has been *guilty of laches*, than to say that he shall lose his rights if he has not exercised them during the prescribed period, whether there has been laches or not. And it is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities or for any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in

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[10] As the king (according to an English law maxim) can be guilty of no laches, it followed from this theory of laches, that the civil claims of the Crown, as well as all criminal prosecutions (which are always instituted in the name of the sovereign), might be commenced at any distance of time. Modern legislation has, however, largely qualified this rule (see Stephen's Commentaries, the Royal Prerogative). The law of limitation in this country, even now, does not apply to criminal prosecutions. See The Queen *v.* Amiruddin, 15 W. R., 25.

At the time of the passing of Act XV of 1877, the Legal Member of the Governor General's Council said: "A Limitation Act should certainly comprise rules as to the time of commencing prosecutions for the various offences under the Penal Code, and we should have inserted the necessary provisions as to this matter, had we not felt the need of consulting the Local Governments before making so important an addition to our law, and for this there was no time."

[1] Lord Blackburn's judgment in Dalton *v.* Angus (1881), 6 App. Cas., p. 818.

Wolf and Vattel advance similar theories of "a presumed consent" and a "presumed abandonment" to explain the loss of a right by lapse of time.—Vattel's Law of Nations, Bk. II, chap. xi.

modern statutes of limitation. But the real policy and purpose of these laws (the quieting of disputes about titles and other matters of right, for the public good) would be defeated, if there was to be a further enquiry as to whether there had been acquiescence on the part of the right-holder.[2] Whatever the theory may be, their true foundation, in point of fact, is *public utility and convenience.*[3]

The true foundation of prescription, public utility and convenience.

It is often maintained that the lapse of the prescribed period raises a presumption that the claim is satisfied or released.[4] But it must be admitted that a statute of limitation is not designed merely to raise such a presumption, and that the presumption of satisfaction is not a correct theory for the administra-

The theory of satisfaction or release.

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[2] See note 1, *ante*, p. 34.

[3] See the judgments of the Lord Chancellor and of Lord Blackburn and the opinion of Field, J., in Dalton *v.* Angus (1881), 6 App., Cas. 740. At page 756, Field, J.. says,—that "the foundation of a right upon mere long uninterrupted possession, as a matter of public convenience, is of very general application. Statutes of Limitation have no other origin, and it is upon this principle that Story, J., in Tyler *v.* Wilkinson, puts rights of this kind," (prescriptive rights). In an earlier case, Adnam *v.* Sandwich (1877), Q. B. Div., p. 485, Field, J., refers to the *theory* of these statutes in the following terms: "They all rest upon the broad and intelligible principle that persons who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties." The learned Judge considered this theory of laches, in construing an *ambiguous* law of limitation, and held that it was not intended by the Legislature to apply to a case where the rightful owner had been guilty of no neglect or default. The language of the law in that case was fairly open to the construction put upon it.

[4] Pothier, Lord Kames and others put forward this theory, but even these authorities do not hold that the statute affords positive presumptions of payment and extinction of contracts. See Angell, s. 66, note.

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tion of such a law, specially where it does not extinguish the right, but simply bars the remedy.[5]

Different laws in different countries, and in different times.

Although the reasons of public policy and other subsidiary reasons adverted to above are of general application, they do not lead to the enactment of the same laws of limitation and prescription in every age and in every country. The length of time required by such laws, the manner and extent of their operation, the exceptions to them, and the events from which the time begins to run, vary not only according to the nature of the rights affected, but also according to the circumstances and necessities of each particular state.[6] One of the most important of these circumstances is the state of the commerce and trade of the country. The progress of commerce leads to the multiplication of contracts, and the frequency of intercourse between man and man, and thus enlarges the field of dispute and litigation. To check this litigation, rules of limitation

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[5] See the remarks of Justice Wayne in Townsend *v.* Jemison. Angell, s. 66, note. Justice Holloway, in Valia *v.* Vira (I. L. R., 1 Mad, 228, 231), says that Savigny and Lord Coke supposed, "perhaps erroneously," that such statutes are based on the presumption of discharge As regards immoveable property, M. Melvill, J., says:—"The principle upon which Statutes of Limitation rest is not so much that long adverse possession creates a presumption of title (for the law could hardly treat such a presumption as irrebuttable); but, rather, that it would be unfair to call upon a defendant to defend his title when, through lapse of time, his muniments of title would be likely to have been lost."—Chhagonlal *v.* Bapubhai, I. L. R., 5 Bom., 68, 72.

But even where the statute does not apply, the *fact* of payment or satisfaction may, of course, be presumed from lapse of time or other circumstances which render the *fact probable*.—Angell, s. 93.

[6] See Angell, s 22.

In this view Statutes of Limitation may be regarded as "rule of *domestic* policy"—Westlake, p 254.

more or less stringent are rendered necessary. But until this necessity arises, the Legislature does not ordinarily interfere. Thus, there was no statute limiting actions *ex contractu* or *ex delicto* in England, until the reign of James I, and the ancient Hindus, who were by no means a commercial people, had no such law at all.

The principle on which the length of the period of prescription is determined.

Another circumstance is the state of knowledge in the country and the character of the administration of justice. Where the people are ignorant, and where suits cannot be carried on except at great sacrifice of time and money, longer periods of limitation are allowable. But as knowledge is diffused and the administration of justice becomes regular and pure, the periods of limitation are safely abridged.[7] The periods should be so fixed as "to leave to the owners of things, and to those who pretend to any rights," ample time to recover them, and yet not to countenance claims which have been long dormant.[8]

According to Vattel the law of limitation and prescription is a part of the law of Nature and the voluntary law of nations.

It has been maintained by Puffendorf, Wolfius, and Vattel that the doctrine of limitation and prescription is derived from the law of Nature. M. De Vattel observes, that although Nature has not herself established an exclusive right of property over

[7] The First Report of the English Real Property Commissioners.

[8] *Ibid;* and Domat, Bk. III, tit. 7, s. 4. The facilities for *recovering* debts in England being greater than in India, the shorter limitation of three years to actions of debt here is open to objection. See Mr. Stoke's speech in the Legislative Council, 19th July 1877. But the fact that written evidence is more liable to destruction in this country is one reason why our periods of limitation are shorter.—*Ibid.*

The periods of limitation applicable to bills of exchange and other mercantile contracts should, if possible, be the same in all countries which are closely connected with each other by commerce

See Statement of Objects and Reasons of Sir J. Colvile's Limitation Bill.

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[9] Vattel's Law of Nature, Bk. II, chap. xi.

The necessary and the voluntary law of nations (as distinguished from the customary and the conventional law of nations) are both established by nature, but each in a different manner; the former as a sacred law, which nations and sovereigns are bound to respect and follow in all their actions ; the latter, as a rule, which the general welfare and safety induce them to admit in their transactions with each other. The voluntary law is the uniform practice of nations in general.

[10] See Brown on Limitation, Bk. I, chap. i, s. 1.

Grotius favors the opinion that prescription is established by municipal law, though he is sometimes quoted as upholding the opposite view. Lord Coke observed that the limitation of actions was by force of divers Acts of Parliament. Co. Litt. 115.

greater or less extent, by most civilized nations. Lord Stair, in his Institutions treating of the law of Scotland, says: "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and time of it."[1]

According to Lord Stair, it is a Positive law.

The great jurist Thibaut considers the law of limitation and prescription to be a singular, or special and arbitrary law, and he accordingly places it under the head of *jus singulare*,[2] as opposed to *jus commune*, which is common to all societies and conformable to natural legal principles.

According to Thibaut, it is *jus singulare*.

Modern jurists divide the municipal or positive law of every political community or nation into two kinds: 1st, Natural; 2nd, Positive.[3] Natural laws are those which are common to all political societies, and being palpably useful have their counterpart in the shape of moral rules, even in natural societies which have not ascended from the savage

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[1] See this passage quoted in Montriou's Institutes of Jurisprudence, p. 178; and in Dalton *v.* Angus, 6 App. Cas., p. 818.

"Matter"—whether it applies to all things and rights, or only to some things and some rights.

"Manner"—whether it operates negatively only or positively also.

"Time"—whether the prescriptive period is 12 years or more or less.

[2] Lindley's Thibaut, pp. 30 and 175.

It should be observed that laws creating *privilegia* are sometimes called *jus singulare*, but Thibaut does not use the term in that sense.

[3] The expression "positive law" is sometimes used as the name of a genus, and sometimes as the name of a species.

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state. All other laws are merely positive, *i.e.*, of purely human position.[4] According to this classification, laws of limitation and prescription are *positive* laws.

But a "sense of a great good and a great evil" has in all times and places led almost all civilized nations, by perfectly distinct paths, to the adoption of the doctrine of prescription, which though "arbitrary in its term, is fixed in its principle."[5] It must be admitted, however, seeing that the doctrine is not recognized by the old customs of Scotland and the laws of the Jews and the Mahomedans,[6] that laws of limitation and prescription are not natural laws of universal application. Lord Blackburn, in his judgment in Dalton *v.* Angus (1881), adopts the view put forward by Lord Stair, and holds that such laws are not derived from natural justice, but are positive laws founded on expedience and varying in different countries and at different times.

Lord Blackburn follows Lord Stair.

The law of limitation and prescription is public law, as opposed to provisional law.

Laws of limitation and prescription are often classed as a department of Public Law. They are introduced mainly for the public good, and are simply imperative or absolutely binding. The Legislature determines absolutely what shall be the effect of the lapse of a certain time under certain circumstances, whether the parties concerned provide otherwise or

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[4] Austin's Lectures, Lec 32. Natural laws are supposed to proceed from the intelligent and rational nature, which directs the universe, and are known to men through a natural reason or an infallible moral sense.

[5] Phillimore's Private Roman Law, p. 125.

[6] Lord Stair's Institutions, Bk. II, tit. 12, s. 9. See 6 App. Cas., p. 818; and Lecture 1st, p. 16, *ante*.

not.[7] Such laws cannot be altered or derogated from by private compacts. *Jus publicum privatorum pactis mutari non potest.*

In the Full Bench case of Kisto Kamal Sing *v.* Hurree Sardar (13 W. R., F. B., 44; S. C., 4 B. L. R., F. B., p. 105) Sir Barnes Peacock, C. J., says: "If a man having a cause of action against another to recover immoveable property or to recover money, or to recover damages for a trespass upon his land or for an assault, should say to that person 'I will not sue you for twenty years' he would not acquire a right to sue after the period of limitation fixed by law. If he binds himself not to sue within a stated period, and does not intend to give up his right to sue at all, he must take care not to bind himself beyond the time within which the law of limitation allows him to sue." "The Legislature must have had some object in limiting the period, and that object cannot be frustrated by any private agreement." So again, an agreement by a person *against* whom a cause of action has arisen, that he would not take advantage of the statute, cannot affect its operation on the original cause of action,[8] unless indeed such agree-

[7] In this sense public or prohibitive law is opposed to dispositive or provisional law. The expression "public law" is extremely ambiguous. See Austin's Jurisprudence by Campbell, Vol. II, pp. 780-82. For instances of "provisional law," see ss. 230 and 253 of the Indian Contract Act (No. IX of 1872), and ss. 106 and 305 of the Indian Succession Act (No. X of 1865).

[8] East India Company *v.* Oditchurn Paul, 5 Moo. I. A., 44; and Darby and Bosanquet on the Statutes of Limitation, pp. 56, 57 and 437. According to articles 2220 to 2223 of the Code Nopoleon, "prescription cannot be renounced by anticipation," but prescription acquired may be renounced or abandoned if the party is not incapable of making an alienation. See pp. 104, 105. *infra.*

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ment amounts to an acknowledgment of liability which the statute itself recognizes as an exception to the rule.

Laws of prescription and limitation are general private laws, substantive and adjective.

According to Bentham's classification, laws of limitation and prescription are *general* private laws, which are either substantive or adjective.[9] A law of limitation as affecting the form of the remedy, comes under the head of adjective law. A law of prescription as affecting the substance of the right itself comes under the department of substantive law.

Where a particular statute of limitation not only bars the remedy but extinguishes the right, it ceases to be merely adjective law or law which regulates the practice of the forum.[10] It then becomes, in so

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[9] Substantive or material law (as opposed to adjective, formal, instrumental or processual law) is the law which the Courts are established to administer as contradistinguished from the rules of procedure according to which such law is administered. See Austin's Jurisprudence, Vol. II, p. 611. "Private law," according to Bentham, is opposed to political or constitutional law, and "general law" is opposed to the law of personal status.

[10] Krishna Mohun Bose *v.* Okhil Money Dassee, I. L. R., 3 Calc., 331, A.C. See also the remarks of Holloway, J., in Vallia Tamburrati *v.* Vera Rayan, I. L. R., 1 Mad., 228, 234.

It may be here observed that, as regards *immoveable* property, the weight of authority is in favor of the position that even where the law in *terms* limits the suit only, it *in effect* gives the adverse possessor the *property* as well as the possession; and that the question whether the law bars the remedy only, or extinguishes the right, becomes immaterial. Thus, in an action of ejectment brought in the Calcutta Supreme Court to recover some lands in the mofussil of Bengal, although the period of twenty years allowed by the *lex fori* (21st James I, c. 16) had not expired, the Court held, that as the mofussil law (Reg. III of 1793, and Reg. II of 1805) in effect extinguished the right of property after twelve years' adverse possession, the plaintiff, who had been dispossessed for more than twelve years, was not entitled to a decree.—Shib Chunder Dass *v.* Shib Kissen Dass, 1 Boulnois' Reports, p. 70. As regards immoveable property, the *lex loci rei sitæ* is preferred to the *lex fori*. See Story's Conflict of Laws, s. 482, *et seq.*, 581; Westlake's Private International

far as it extinguishes rights, a part of the substantive law of the place. The rule laid down in sec. 28 of the Indian Limitation Act, 1877, is, therefore, a rule of substantive law. But the law of limitation, strictly so called, is always a *lex fori*,—it goes *ad litis ordinationem* and not *ad litis decisionem;* it goes to the remedy, and bars the hearing of the cause; and does not go to the right and determine the merits of the cause.[1]

The law of limitation a *lex fori*.

"It has become almost an axiom in jurisprudence," say their Lordships of the Privy Council in an Indian case, "that a law of limitation is a law relating to procedure having reference only to the *lex fori*."[2] In another case their Lordship say that, in matters of procedure, all mankind, whether aliens or liege subjects, are bound by the law of the forum.[3] The reasons of the rule are thus given by Story in his Conflict of Laws (s. 581): "Courts of law are maintained by every nation for its own convenience and benefit, and

The *lex fori* preferred to foreign law in matters of procedure.

Law, p. 182; Pitt *v.* Dacre, L. R., 3 Ch. Div. 295. *In re* Peat's Trusts (L. R., 7 Eq., 302; 1869), in which the sale-proceeds of certain houses in Calcutta had to be administered in England, it was held by V. C. James, that one of the co-proprietors having been dispossessed of a share of the property for more than twelve years, his claim to such share of the sale-proceeds was barred by cl. 12, s. 1, Act XIV of 1859, which was the *lex loci rei sitæ*. Generally speaking, all suits relating to land are brought in the Court of the place where the land is situate, and the question of preference does not arise. As regards *prescriptive right* to immoveable property, all agree that the *lex loci rei sitæ* must be applied. Opinions, however, differ as to the law which ought to regulate the title to moveables so acquired. But as the title depends on possession, which is a *mere fact*, it is reasonable that the law of the place where this fact occurs should be applied. Woolsey on International Law, 4th Ed., p. 116.

[1] Story's Conflict of Laws, ss. 576, 580.

[2] Ruckmabye *v.* Lulloobhoy, 5 Moo. I. A., 234.

[3] Lopez *v.* Burslew, 4 Moo. P. C. C., 300.

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the nature of the remedies and the time and manner of the proceedings are regulated by its own views of justice and propriety, and fashioned by its own wants and customs." "It is not obliged to depart from its own notions of judical order from mere comity to any foreign nation." Accordingly, where different laws of limitation are established in different countries or in different parts of the same country, and they conflict with each other, the law of the Court or forum in which the suit or proceeding is brought, governs the case. The *lex fori* is preferred to the *lex loci contractus* or the *lex loci delicti commissi.* The statute of limitation being a rule of *domestic* policy, it is agreed on all hands that the Courts are justified in declining to enforce an obligation which is barred by the statute, although it may be still enforceable according to some foreign law of limitation.[4]

A foreigner has no right to crowd the tribunals of any independent community with stale claims of his own. There can be no just reason in allowing him higher privileges than are allowed to subjects.[5] And a Native subject to whom a cause of action arises in a foreign country can have no pretence to say that he is entitled to the longer time allowed by the law of the foreign country.

Where the foreign law allows a shorter period, and the action is barred by that law, some jurists (according to whom the bar of the action is a virtual extinc-

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[4] See Westlake's Private International Law, p. 254. *Lex fori* is the law of the forum or Court where the suit is brought. *Lex loci contractus* is the law of the place of the contract. *Lex loci delicti commissi* is the law of the place where the tort or *delict* is committed.

[5] Story's Conflict of Laws, s. 576.

tion of the *right*), maintain that such bar ought to be recognized by the Court where the suit is instituted.[6] But in England and the United States of America it has always been a rule, that, in personal actions, limitation strictly affects the remedy and not the right. And unless the foreign law actually *extinguishes* the obligation itself, the English and American Courts refuse to give effect to such law, whether the period allowed by it be shorter[7] or longer[8] than that allowed by their own laws.[9]

The same rule applies whether the foreign law allows a shorter or a longer period.

Story in his Conflict of Laws, s. 582, and Chief Justice Tindal in Huber *v.* Steiner, lay down that a foreign law of limitation may be preferred to the *lex fori* on two conditions:[10] (i) that the foreign law extinguishes the right or obligation itself;[1] and (ii) that both the parties have resided in the country where such law prevails for the whole of the prescribed time. But if the foreign law is so framed as to operate

The conditions on which a foreign law of limitation may be preferred to the *lex fori*.

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[6] See Angell on Limitations, chap. viii, s. 66. Justice Story, before he published his Conflict of Laws, was of this opinion. Mr. Westlake, following Savigny, also appears to take the same view of the matter. See his Private International Law, p. 254. The view taken by the English and American Courts is supported by Vangerow. "Illustrious names are to be found on both sides, Savigny at the head of the one, and Vangerow of the other"—*Per* Holloway, J., in Valia *v.* Vira, quoted above.

[7] Huber *v.* Steiner, 2 Bing., New Cases, 202; and Townsend *v.* Jemison. See Angell on Limitations, chap. viii, s 66.

[8] British Linen Company *v.* Drummond, 10 B. and C., 903.

[9] Ruckmabye *v.* Lulloobhoy Motichand, 5 Moo. I A., 234; and Story's Conflict of Laws, s. 577.

[10] Sec. 12 of Act IX of 1871 and sec. 11 of Act XV of 1877 lay down the same rule.

[1] This, however, is not perhaps a frequent case in regard to personal actions. (Banning on Limitation, p. 9.) Even under the Scotch and the French law of prescription as to debts, the right or the obligation is not extinguished, see Don *v.* Lippman and Huber *v.* Steiner.

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upon the case without such residence, the second condition would seem to be inapplicable.[2]

Limitation is not "of the nature of the contract."

In respect of actions *ex contractu* it may be observed, that the limitation of the *remedy* is not a part of the contract, but relates to the breach of it, which it would be contrary to good faith to suppose the parties had in contemplation at the time of entering into it.[3] But if the bar extinguishes the right or the obligation itself, it may be taken as an incident of the original contract, and, as such, its validity must be determined even in a foreign forum by the *lex loci contractus*.[4] If the *lex loci contractus* declares the obligation to be a nullity after the lapse of the prescribed period, it may be set up, in any other country to which the parties remove, *by way of extinguishment*.[5]

Otherwise, when the bar extinguishes the right.

When the time of the extinguishment of the right itself by the foreign law is shorter than the time of the limitation of the action by the *lex fori*, the validity of the former bar is sufficient to dispose of the case. But where the time allowed by such foreign law is *longer*, the foreign law, as well the *lex fori*, is applicable. The bar to the remedy resulting from the latter, and the extinguishment of the right resulting from the former (the *lex loci contractus*) may both be pleaded on one and the same record.[6]

When the *lex fori* and the *lex loci contractus* are both applicable.

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[2] See Smith's Leading Cases, 8th Ed., Vol. I, p. 699.

[3] See Don *v.* Lippman, 5 Clarke and Finelly, 1, *per* Lord Brougham.

[4] *Per* Colvile, J., in Beerchand Poddar *v.* Romanath Tagore, Taylor and Bell's Reports, p. 131. It is an established principle of international law that the validity, interpretation and obligatory force of contracts must be determined according to the *lex loci contractus* or *solutionis*.

[5] Huber and Steinor, quoted above.

[6] See Beerchand Poddar *v.* Romanath Tagore, quoted above.

If the law of the country in which the suit is instituted, as well as the foreign law, not only bars the remedy but extinguishes the right, the *lex fori* must, so far as it extinguishes the right, yield to the *lex loci contractus* or *solutionis*.

The personal law of the Hindus and Mahomedans yield to the *lex fori*.

The Hindu and Mahomedan laws being *personal* to Hindus and Mahomedans, and foreign to the Courts of British India, the Hindu and Mahomedan rules of limitation, if any, cannot be pleaded by Hindus and Mahomedans in such Courts, even in cases where their own substantive laws are preserved to them by the law of British India. Thus it has been held, that in suits for pre-emption between Mahomedans, it is not necessary to consider whether the Mahomedan law requires the plaint to be filed within a period shorter than that allowed by the Regulations and the Acts.[7] And where the question was whether the *lex fori* of the Calcutta Supreme Court, *viz.*, the Statute 21st James I, which fixed a six years' limit, or the Hindu law which it was alleged prescribed a ten years' limit, should be applied to an action *ex contractu* brought in the Supreme Court by one Hindu against another, it was held that the Statute of James I, was the only applicable bar.[8] It has also been ruled that the law of limitation being a law of

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[7] Mahammed Danesh *v.* Choora Gazee, Cal. Sudr Dewany Adwalat Reports of 1851, p. 29. See also the Reports of 1859, p. 461.

[8] Beerchand Poddar *v.* Romanath Tagore, Taylor and Bell. p. 131. In this case the Court was of opinion that, by Hindu law, there was no limitation to actions on contracts, and that if there was, it did not extinguish the obligation, and therefore did not form a part of the contract, so as to render the Hindu law applicable under s. 17 of the 21st Geo. III, c. 70.

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procedure, in order to see by what computation the time must be reckoned, we must look to the calendar and the mode of computing time, according to the law which regulates the proceedings of the Court by which the suit is tried. In British India, this must be the English calendar, and not the Fuslee or any other native calendar, except where the law expressly otherwise provides.[9]

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[9] Maharajah Joy Mungul *v.* Lall Rung Pal, 13 W. R., 183.

# LECTURE III.

## THE HISTORY OF THE LAW OF LIMITATION AND PRESCRIPTION IN BRITISH INDIA.

(I.) Bengal Mofussil — Plan for the administration of justice, 1772 — Regulation III of 1793 — Regulation II of 1805 — Other laws — (II.) Madras Mofussil — Regulation II of 1802 — (III.) Bombay Mofussil—Regulation I of 1800 — Regulation V of 1827 — The three Codes of Bengal, Madras, and Bombay compared — Non-regulation Provinces — Execution of decrees — (IV.) The Supreme Courts — 21 James I, c. 16; 4 Anne, c. 16 — Act XIV of 1840 — Execution of decrees —The law of the Supreme Courts compared with that of the Mufussil Courts — Draft Limitation Bills, 1841-1855 — Act XIV of 1859 — Act IX 1871 — Extinctive and Positive Prescription partially introduced — Act XV of 1877.

BEFORE Act XIV of 1859 (an Act to provide for the Limitation of Suits) came into operation in 1862, there was one code of laws for the Courts established by royal charter in the Presidency-towns, and a separate code for the Company's Courts in each of the three Presidencies of Bengal, Madras, and Bombay.

I. Bengal mofussil.

When the administration of civil justice in Bengal was first committed to the servants of the East India Company, and Courts of Dewany Adwalat were established, a plan for the administration of justice was proposed by the Committee of Circuit, which was adopted by Government on the 21st August 1772. This document makes the following declaration: "By the Mahomedan law, all claims which have laid

Plan for the administration of justice, 1772.

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dormant for twelve years, whether for land or money, are invalid; this also is the law of the Hindus and the legal practice of the country."[10] This statement does not appear to be correct with respect to the Hindu and Mahomedan laws,[1] though it may have been so with regard to the legal practice of the country; and whether previously established or not, the rule had been in force for upwards of twenty years, when Lord Cornwallis codified the law in 1793.

Reg. III of 1793.

Section 14, Regulation III of 1793, prohibited the zillah and city Courts from hearing, trying, or determining the merits of any suit whatever against any person or persons, if the cause of action accrued previous to the 12th August 1765 (the date of the Company's accession to the Dewany of the Provinces of Bengal, Behar, and Orissa), or if the cause of action arose twelve years before the commencement of any suit on account of it; unless the complainant could shew, by clear and positive proof, (*a*) that he had demanded the money or matters in question, and that the defendant had admitted the truth of the demand or promised to pay the money (within the last twelve years so as to constitute a new ground of action within the limited period); or (*b*) that he had directly preferred his claim within twelve years (after the origin of the cause of action) for the matters in dispute, to a Court of competent jurisdiction to try the demand, and assigned satisfactory reasons to the Court why he had not proceeded in the suit; or (*c*)

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[10] See the Preamble to Reg. II. of 1805.

[1] See pp. 16, 19—27, *supra*.

unless he proved, that either from minority or other good and sufficient cause he had been precluded from obtaining redress. The same prohibitions were extended to the Province of Benares by Sec. 8, Regulation VII of 1795, and to the Ceded Provinces by Sec. 18, Regulation II of 1803, with the substitution of the dates of the Company's acquisition of those provinces for the 12th August 1765.

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Regulation II of 1805, following the English Nullum Tempus Act (9 Geo. III, c. 16), fixed sixty years as the period of limitation in respect of suits and claims by Government for the recovery of public rights and dues, not being penalties recoverable in the Civil Courts under any law in force. (Secs. 2 and 6.) This Regulation also restricted the limitation of twelve years, in cases of immoveable property, to possession under a just and honest title, and allowed a period of sixty years to claims of right to such property, if the claimant could shew, by sufficient proof, that the person in possession acquired the same by violence, fraud, or by any other unjust and dishonest means, or that the property claimed had been so acquired by any other person from whom the actual occupant derived his title, and was not subsequently held for twelve years under a fair title believed to convey a right of possession and property. (Sec. 3, Regulation III of 1805.)

Reg. II of 1805.

A period of one year only was allowed to suits for penalties and summary suits for arrears of rent. (Secs. 4 and 6.) It was declared that no length of time would bar the cognizance of suits for the recovery of property mortgaged or deposited, pro-

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vided the party in possession or his predecessor in interest had not held it under a title *bonâ fide* believed to have conveyed a right of property to the possessor. (Sec. 3, cl. 4.) Subject to this declaration, Sec. 3, cl. 3, deprived the Courts of all authority to take cognizance of *any suit whatever* if the cause of action arose sixty years before the institution of the suit; and in Chundrabolee Debi *v.* Lukhi Debi, 5 W. R., P. C., 1, it was held, that this provision modified the *nullum tempus* clause of Regulation XIX of 1793 as to suits for the resumption or assessment of *lakhiraj* holdings created after the 1st December 1790.

Other laws.

Regulation VIII of 1831, Sec. 6, assigned a period of one year to regular suits for contesting the summary awards of the Revenue Authorities in matters connected with arrears or exactions of rent.

Act I of 1845, Sec. 24, and Act XI of 1859, Sec. 33, prescribed a limit of one year to suits to set aside sales for arrears of revenue.

Act XIII of 1848 fixed a period of three years for suits to contest the justice of certain possessory awards made by the Revenue Authorities in the Presidency of Bengal.

II. Madras mofussil Reg. II of 1802.

Clauses 1, 2 and 3 of Madras Regulation II of 1802, Sec. 18, provided for suits of which the cause of action accrued before the date of the Company's acquisition of the country.

Clause 4 enacted a general law of limitation in the following words: "The Courts of Adwalat are prohibited from hearing, trying, or determining the merits of any suit whatever, against any person or

persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can shew, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim within that period, for the matters in dispute, to a Court of competent jurisdiction or *person having authority, whether local or otherwise, for the time being, to hear such complaint*, to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that, either from minority or other good and sufficient cause, he was precluded from obtaining redress."

"But from this rule are excepted all claims founded on bonds which shall have been in course of payment by instalments, or of which any proportion shall have been paid within twelve years previous to the institution of the suit; and also all claims on mortgages, the period for rendering which obsolete and unactionable is to be determined by the laws of the country."

The first paragraph of this clause, with the exception of the words italicised, is in the same terms as Sec. 14, Regulation III of 1793. As to the second paragraph it may be observed that it was held by the Calcutta Sudder Court that the operation of Sec. 14, Regulation III of 1793 was also barred by the payment of an instalment on a bond. (Cal. S. D., 1845, p. 193; S. D., 1847, p. 277; S. D., 1849, p. 69; and Macpherson's Civil Procedure.)

Article 13 of the First Regulation of the Governor

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III. Bombay mofussil. Reg. I of 1800.

of Bombay, confirmed in Council in August 1800, for the institution of a Court of Justice in Surat, was a transcript of Sec. 14 of Bengal Regulation III of 1793, and corresponded to the first paragraph of clause 4, Sec. 18, Madras Regulation II of 1802.

Reg. V of 1827.

Subsequently, Bombay Regulation V of 1827 enacted as follows :—

*Section I.*—"Whenever lands, houses, hereditary offices or other immoveable property have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him and his heirs, or others deriving right from him, such possession shall be received as proof of a sufficient right of property in the same. But it shall be a sufficient answer to the plea of the possession for more than thirty years, that the person in possession as proprietor, or any of the persons by whom he derives his right, acquired such possession by fraudulent means, on proof whereof a suit may be entertained at any period within sixty years.

"Provided that if such property has been held for more than thirty years by a person or persons *bonâ fide* believing his or their title as proprietors to be good, such title shall not be affected by the fraud of a former possessor.

"Nothing contained in this section shall bar an action of damages brought within sixty years against any of the persons by whom the fraud was committed."

*Section II.*—"In all suits for damages on account of assaults, imprisonments, or other direct insult or injury to the person, it shall be a sufficient defence

that the cause of action arose more than twelve months before the suit was filed.

"And in all suits for damages on account of calumny or slanderous words it shall be a sufficient defence that the plaintiff had been in the knowledge of the calumny or slanderous words more than twelve months before the suit was filed.

"In all suits for recovering the right of participation in caste communications, it shall be a sufficient defence that the plaintiff had been acquainted with his exclusion from the caste more than twelve months before the suit was filed.

*Section III.*—"In all civil suits for debts not founded upon, or supported by, an acknowledgment in writing, and in all suits for damages other than those specified in the preceding section, it shall be a sufficient defence that the cause of action arose more than six years before the suit was filed."

*Section IV.*—"In all suits not falling under any of the limitations in the preceding sections of this chapter, it shall be a sufficient defence that the cause of action arose more than twelve years before the suit was filed."

*Section VII, Clause I.*—"If, however, a defence be rested on any limitation of time hereto specified in this chapter, and the claimant prove that the defendant, or person from whom he derives right, had admitted the justice of the demand, then the time of limitation shall be reckoned from the date of such admission, provided that if the demand be founded on a written acknowledgment of any sort, the admission, if it shall have been made subsequently to

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the date which shall be fixed for the commencement of the operation of this Regulation, must also be in writing."

*Clause II.*—"Also if the claimant have, within the time of limitation, preferred his claim to any authority (arbitration included) competent to try it, and satisfactory reason be shown why a decision was not passed (such reason no wise affecting the justice of the demand), then the period of limitation shall be reckoned from the date of the last proceeding known to the defendant in such case."

*Clause III.*—"And in cases of the minority or continued insanity of the claimant no limitation shall bar the recovery of a claim sued for within six years[2] of the minor attaining the age of eighteen years or the insane person recovering the use of reason, and if a claimant die during such minority or insanity, the said period of six years from his death shall be applied to suits entered by his heirs or executors."

*Clause IV.*—"Except in actions for damages as described in Sec. 2 of this Regulation, in which cases a period of only one year shall be allowed instead of the period of six years recited in the preceding clause."

*Section VIII, Clause I.*—"If a person claims to recover property held in mortgage, pledge, pawn, or deposit or by other title conferring only a right of

[2] The Agra Sudder Court allowed only a "reasonable" time after the cessation of the disability. The Calcutta Sudder Court allowed the *full* twelve years, if the cause of action first accrued to the plaintiff while he was a minor or a lunatic. (See Calc. S. D., 1855, p. 281.) If a cause of action *devolved* on a person labouring under a disability, the operation of limitation was *suspended*. (See Macpherson's Procedure, App., 198.)

possession, and not a right of ownership, in such case no length of time shall prevent the Court's entertaining the suit."

*Clause II.*—"But should such property have been held, if immoveable, for more than thirty years, by a *bonâ fide* possessor as proprietor; or, if moveable, for any time by a person possessing *bonâ fide* as proprietor, under a right founded on an equitable consideration, such possessor shall not be disturbed, though an action of damages may be entertained against the person by whom it was illegally alienated."

The three Codes of Bengal, Madras, and Bombay compared.

There was no *special* limitation, by the Regulations of Madras and Bombay, to suits for the recovery of penalties or for the recovery of public rights and dues. Nor was there any *such* limitation by the Regulations of *any* of the Presidencies to suits to set aside the summary decisions of the *Civil* Courts.

Positive prescription was not directly recognized by the codes of Bengal and Madras, but it was partially recognized by Bombay Regulation V of 1827. This Regulation again made lapse of time a sufficient *defence*, while the other Regulations *prohibited the Courts* from hearing, trying, or determining the merits of any suit after the lapse of the fixed period of time. Verbal acknowledgments of liability were sufficient to give a fresh start in all cases in the Bengal and Madras Presidencies, but a written acknowledgment was necessary under Bombay Regulation V of 1827, when the debt was founded on a writing. Then, again, the Madras and Bengal

LECTURE III. Regulations gave the Courts a sort of discretion to extend the period of limitation for any "good and sufficient cause," which precluded the plaintiff from obtaining redress; so that even depositing a document in one Court was in one case held to be a "sufficient cause" for not enforcing a claim under it in another Court.[3] But the Bombay Regulation of 1827 distinctly specified *minority* and *continued insanity* as the only disabilities recognized by it.

The Madras Regulation, and Bombay Regulation I of 1800, fixed one general period of limitation, *viz.*, twelve years, for all sorts of suits, and the Bengal Regulations did the same with some few exceptions. Under the Bombay Regulation of 1827, however, suits for damages on account of injury to the person and reputation, and for the recovery of the privileges of caste, were limited to one year; and suits for debts not founded upon or supported by writings, and for damages other than those above specified, were limited to six years. Suits for the recovery of immoveable property and hereditary offices were barred after thirty years, and all other suits after twelve years. The Bengal Code, as well as the Bombay Code, extended the period of limitation to sixty years in cases where the possession of *immoveable* property had been acquired by *fraudulent* means. The former Code also allowed sixty years in cases of *violence.* There were no such provisions in the Madras Code.

The Madras Regulation and the later Bombay Regulation allowed the plaintiff further time if he pre-

[3] See Special Reports of the Indian Law Commissioners, p. 7 (1841-3.)

ferred his claim to any person having authority, while the Bengal Regulation required that the claim should be preferred to a Court of competent jurisdiction. Thus the Regulation law of limitation of each Presidency differed from that which obtained in the other Presidencies, the difference being most remarkable in the case of Bombay Regulation V of 1827, as compared with the Regulations in the other two Presidencies.

Non-Regulation Provinces.

These Regulations did not apply to the Non-Regulation Provinces. The Punjab Code modified Bengal Regulation III of 1793, Sec. 14, and reduced the limitation of actions of debt or contract, excepting partnership accounts, from twelve to six years. In Oude, certain circular orders of the Judicial Commissioner were in force before Act XIV of 1859 was extended to it by public notification by the Executive Government.[4]

Execution of decrees.

The rule as to applications for the execution of decrees was not expressed in the Regulations, but the twelve years' limitation was adopted in Bengal by analogy to the general law for the trial of suits,[5] and

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[4] See Saligram *v.* Mirza Ali Beg, 10 Moore's I. A., 114; and Shah Mukhun Lall *v.* Nawab Imtiazdulla, 5 W. R., P. C., 18.

[5] See Constructions 3, 136 and 1348, and the case of Juggannath Pershad Sircar decided in 1818. The correctness of these constructions and of the ruling in Juggannath Pershad's case may be questioned, but they were upheld on argument on the principle *stare decisis*. (See the case of Sandes, petitioner, decided by a Full Bench of the Calcutta Sudder Court on the 21st February 1852, at p. 67 of the Reports of that year.) A different rule appears to have obtained in the other Presidencies. By a circular of the Bombay Sudder Court, it was ruled that no decree should be *summarily* executed after the expiration of one year from its date without first calling upon the opposite party to state his objections if he had any to offer; it then rested with the Judge to admit or reject

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such applications might, under slight restrictions, be renewed every twelve years.[6]

IV. The Supreme Courts. 21 James I, c. 16; 4 Anne, c. 16.

The three Supreme Courts in the three Presidency-towns adopted the English law of limitation as contained in 21 James I, c. 16, and 4 Anne, c. 16, and such adoption was recognized by Her Majesty's Privy Council in *The East India Company* v. *Odit Churan Paul* (5 Moore's I. A., 43), and in *Ruckmabye* v. *Lallubhoy Mottichand* (5 Moore's I. A., 234). These statutes provided that actions of debt grounded on any contract without specialty, and actions for torts (except slander), assault and imprisonment, must be brought within six years, and actions of slander within two years after the time when the slander was uttered. The Statute of James I further required an adverse possession of twenty years to bar an action of ejectment.

There was no statutable limitation in England with respect to actions founded on bonds and other specialties, before the 3 and 4 Will. IV, c. 42; but, by analogy to the statute, an artificial presumption of payment or satisfaction at the end of twenty years was applied to such cases.[7]

Infancy, unsoundness of mind, coverture, imprisonment, and absence beyond the territories at the time of the accrual of the cause of action were disabilities which entitled the plaintiff to claim

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those objections, and if no valid objection existed, to direct the execution of the decree. A fresh regular suit was necessary if the objections to the execution were admitted by the Judge. (See the Special Reports of the Indian Law Commissioners, 1843, p. 130.)

[6] Calcutta S. D. Rep., 1858, pp. 1341, 1580.

[7] Darby and Bosanquet, p. 95; Angell, § 93.

exemption from the operation of the Statute of James I. The Statute of Anne introduced a further exception in the case of *defendant's* absence beyond the territories, at the time when the cause of action arose.

Acknowledgments and payments made by the debtor were treated by the Courts (though not recognized by the statute) as giving the plaintiff a fresh start, on the ground that, from such acts, a promise to pay might be implied. The acknowledgments were subsequently required to be in writing signed by the debtor. (See Act XIV of 1840, extending Lord Tenterden's Act, 9 Geo. IV, c. 14, to India.)

Act XIV of 1840.

The 3 and 4 Will. IV, c. 27 (an Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto), the 3 and 4 Will. IV, c. 42, providing limitations for actions on specialties, and 2 and 3 Will. IV, c. 71, relating to the acquisition of easements and profits by prescription, were never extended to India, and the Supreme Courts did not administer these laws in the Presidency-towns.

It was held in some cases of contract between Hindus that, under 21 Geo. III, c. 70, s. 17, the Hindu law of limitation, if any, and not the Statute of James I, was applicable in the Supreme Courts.[8] It was, however, subsequently determined by the Calcutta Supreme Court, that the English law of limitation as a part of the *lex fori*, was applicable to all

[8] Krisno Chand Seal *v.* Ramdhone Nundan, 1834, Morton's Reports, p. 345, and other cases in the same Reports.

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classes of suitors in that Court, and that the Statute of George III had reference only to the *substantive* Hindu law of contracts.[9] This question, which had been determined in the same way by the Supreme Court of Bombay, was, in 1852, conclusively settled by the Privy Council in the case of *Ruckmabye* v. *Mattichand* (5 Moore's I. A., 234).

Execution of decrees.

In the Plea Side of the Supreme Courts, writs of execution were required to be sued out within a year and a day after the judgment was entered. But, after the year and day, the claimant was allowed to issue a *scire facias* calling on the defendant to shew cause why execution should not issue. The proceeding was in the nature of a new action to give effect to the old. An award of execution in pursuance of the *scire facias* revived the judgment.[10]

The law of the Supreme Courts compared with that of the Mofussil Courts.

The law of limitation of the Mofussil Courts in each Presidency differed from the English law of limitation which governed the Supreme Courts, not only in the periods of limitation, but in the excep-

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[9] Beer Chand Poddar *v.* Romanath Tagore, Taylor and Bell, p. 231

[10] See Asutosh Dutt *v.* Durga Charan Chatterjee, I. L. R., 6 Calc., 504; (S. C.) 8 C. L. R., 23. Since the Common Law Procedure Act of 1852 (15 and 16 Vict., c. 76), the period of a year and a day is in England extended to six years, and a writ of revivor is issued in lieu of a *scire facias*. During the lives of the parties to a judgment, execution may now issue as of course at any time within six years from the recovery of the judgment. After that period, or after a change by death or otherwise, before execution can issue upon it, it must be revived by *writ*, or with leave of the Court or a Judge, by *suggestion*. (Broom and Hadley's Commentaries, Vol. III, and Stephen's Commentaries, Vol. III.)

An equity suit in the Supreme Court was revived by a bill of revivor, and latterly by the simpler method of a suggestion introduced by Act VI of 1854, sec. 31 (Attermony Dasee *v.* Hurrydass Dutt, 9 C. L. R., 557.)

tions to the application of those periods; and also in the principle on which those exceptions, where they were the same, were allowed.[1]

Previous ineffectual proceedings for the matters in dispute, in the Mofussil of all the three Presidencies, and fraud in the acquisition of possession in that of Bengal and Bombay, were recognized as exceptions to the ordinary rule of limitation; but such exceptions found no place in the statutes which were administered in the Presidency-towns; while the disability of coverture and the exception in the case of *defendant's* absence in a foreign country,[2] admitted by the English law, had no place in the Indian Regulations. Again, the principle on which the English law had been framed, *viz.*, that when the statute commenced to run it did not cease to run, was unknown to the Regulations.[1] If the person entitled to seek redress, or the person under whom he claimed, was precluded by any disability from obtaining redress, during *any part* of the period of limitation, whether at its commencement or otherwise, the operation of the rule under the Regulation was *suspended*, and the time during which such disability lasted was excluded in computing the period of limitation.[3]

The anomaly of having one code of laws for the

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[1] See Sir James Colvile's Speech in the Legislative Council, 7th July, 1855.

[2] Plaintiff's absence in a foreign country at the time when the cause of action arose was considered a "good and sufficient cause" within the meaning of the Bengal Regulations but the *defendant's* absence was not *per se* a "good and sufficient cause" (See Macpherson's Civil Procedure, Appendix, and Ishan Chand v. Partab, 5 W R, 31, P. C.)

[3] Troup v. E I Company, 7 Moore's I. A., 101, 4 W R, P. C., 121.

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Draft Limitation Bills, 1841-1855.

Courts established by royal charter, and three other codes for the Mofussil Courts in the three Presidencies, attracted the notice of the Legislature about forty years ago. In 1841, a Draft Act was prepared with the double object of amending the law of limitation existing in the Courts of the East India Company, and of extending to the Crown Courts in India the amendments introduced into the English law of limitation by the statutes passed in the reign of William IV, and by 1 Vict., c. 28. Subsequently, in 1842, the Indian Law Commissioners, with the concurrence of a majority of the then Judges of the Supreme Courts, proposed to substitute, for the Draft Act of 1841, a uniform law for the acquirement and extinction of rights by prescription and for the limitation of suits, and they drafted a Bill for the purpose. But nothing further was done in the matter until 1855, when Sir J. Colvile moved the first reading of the Commissioners' Bill as slightly amended by himself.[4] In 1859, the provisions relating to prescription were expunged from the Bill, and it was passed as Act XIV of 1859. This Act provided one uniform law of limitation for all the Courts in British India,[5] except as to proceedings for the execution of decrees of the Supreme Courts, certain suits by mortgagees in those Courts, and suits for public claims under Bengal Regulation II of 1805. The Act *shortened* the periods[6] of limitation allowed by the Regulations and

Act XIV of 1859.

[4] See note 1, *ante*, p. 63.

[5] Kristo Kinkur Ghosh *v* Buroda Kanta Sing, 17 W. R., 292, P. C.

[6] The *general* periods adopted were twelve years for suits relating to immoveable property, specialties governed by English law, and legacies: and six years for other personal demands. The shorter period of three

the Statute of James I; laid down rules applicable to the *execution* of decrees; *specified* the grounds of exception[7] to the operation of the ordinary rule of limitation; and rendered *verbal* acknowledgments of liability, or payments by the debtor, ineffectual to keep alive or revive the debt. The principle of English law that a "legal disability" to be effectual as an exception, must exist at the time when the cause of action accrued, was for the first time adopted by this Act. The Act further provided a limitation to suits for recovery of property against a mortgagee, pawnee, or depositary.

Sir James Colvile proposed to enact specific rules for the acquisition and extinction of rights by *prescription*, but the Act of 1859 provided for the *limitation* of suits only, and as such left untouched the rule of *prescription* contained in Regulation V of 1827 of the Bombay Code.[8]

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years was applied to suits for money lent, for breaches of unregistered contracts, for rents, for hire and for the recovery of property comprised in certain possessory awards. Under the limitation of one year were brought suits for pre-emption, for penalties, for damages not affecting immoveable property, for wages, and for setting aside public sales and summary orders.

[7] The following were the grounds of exception: 1. Legal disability of the plaintiff, including *coverture* in cases governed by English law, minority, idiocy, and lunacy. 2. Ineffectual proceedings *bonâ fide* taken by the plaintiff in a Court *without jurisdiction*. 3. *Defendant's* absence from British India. 4. Written acknowledgments of liability to pay a debt or legacy, *signed* by the defendant. 5. Concealed fraud of the defendant, whether the subject of the suit was immoveable property *or not*. Besides these grounds, which gave the plaintiff an *extension* of time, the Act mentioned another which gave him an *unlimited* time, *viz.*, the relation of trustee and *cestui qui trust*. Secs. 11, 14, 13, 4, 9 and 2 of Act XIV.

[8] Maharana Futtehsangji *v.* Dessai Kullianrai, 21 W. R., 178, P. C.; L. R., 1 I. A., 34. That part of Bombay Regulation V of 1827 which

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Act XIV of 1859 is couched in language much more precise than the loose phraseology of the earlier Regulations, but the Judicial Committee of the Privy Council did not hesitate to characterize it as an "inartificially drawn statute,"[9] and the later Act of 1871 (Act IX) as a "more carefully drawn statute" of limitation.[10]

Act IX of 1871.

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referred to prescription was repealed by Act IX of 1871. Before this repeal the state of the law in the Bombay Presidency was this:—A person who, without title, had been in adverse possession of any immoveable property for twelve years, could, under cl. 12, Sec. 1 of Act XIV of 1859, resist any suit brought to recover it from him, but no such possession short of thirty years could create a title in his favor under Reg. V of 1827. The proprietor's title, therefore, did not become extinguished by twelve years' adverse possession of another, though his right of suit against that other became barred by Act XIV of 1859 Accordingly, if such person happened to lose his possession, and the proprietor to regain it, the former, unless he sued within six months under Sec. 15 of that Act (= Sec. 9, Act I of 1877), must fail in any suit to eject the latter, having no title to stand upon. If the Regulation had not fixed a *longer* period of prescription, the original title would have been practically extinguished by Act XIV, and could not have been revived, by a re-entry after twelve years, upon the doctrine of remitter. See Rambhat *v.* The Collector of Puna, I. L. R., 1 Bom., 592, 598, 599. This doctrine of remitter is inapplicable to a right which is wholly remediless, *i.e.*, for which even a droitural real action does not lie. And the doctrine is necessarily inapplicable where the right itself is *extinguished*. (Sibchunder *v.* Sibkissen, 1 Boulnois, 70; Brindabun *v.* Tarachand, 20 W. R., 114, Brassington *v.* Llewellyn, 27 L. J. Exch., 297.) In England, before the abolition of real actions in general, a droitural action was maintainable even *after* a possessory action of ejectment had been barred by the Statute of James I. In Bengal, no such action was maintainable after the twelve years, and the right was wholly remediless. The doctrine of remitter therefore had no application.

[9] The Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C.

[10] Maharana Futtehsangji *v.* Dessai Kulhanrai, 21 W. R., 178, P. C.

Sir James Colvile, who introduced the original bill, and Sir Barnes Peacock, at whose instance several amendments were made before the bill was passed into law (Act XIV of 1859), were both parties to the judgments in the cases mentioned above.

Act XIV of 1859 had not been in force for ten years when Act IX of 1871 was passed with the object (i) of introducing amendments[1] mainly suggested by

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[1] The following are some of the amendments referred to above:

1. The Courts are required to give effect to the law whether the defence of limitation be pleaded or not. (Under Act XIV of 1859, the rulings on this point were by no means uniform.)—Sec. 4, Act IX of 1871.

2. An extension of time is allowed when the period of limitation expires on a day when the Court is closed. (Under Act XIV, such extension was not allowable. Rajkristo Roy *v.* Denobundhu Surma, 3 W. R., S. C. C. Ref., p. 5.)—Sec. 5, a.

3. Special laws of limitation are expressly saved from the operation of this general Act. (This is in accordance with the rulings on the subject.)—Sec. 6, Act IX.

4. Express provision is made for co-existing or double disabilities. Any mention of the disability arising from coverture is designedly omitted.—Sec. 7, Act IX.

5. It is expressly declared that, in suits on foreign contracts, the *lex fori* shall be preferred to the limitation law of the country where the contract was entered into.—Sec. 12.

6. In computing the period of limitation, the day on which the right to sue accrued is, in every case, to be excluded. (Under the old law, the decisions on this subject were not uniform.)—Sec. 13.

7. The time during which the commencement of a suit has been stayed by injunction is to be excluded. (This rule is borrowed from Sec. 589 of the New York Code.)—Sec. 16.

8. The rule of English law, that a right to sue cannot accrue unless there is at the time a person in existence capable of suing, as also a person in existence capable of being sued, is adopted, except in respect of suits for the possession of land or of an hereditary office.—Sec. 18.

9. Amendments of the law relating to acknowledgments and payments (referred to in the text) are introduced by Secs. 20 and 21. Acknowledgments must now be made *before* the expiry of the period of limitation. The rule of English law, that the terms of a lost written acknowledgment may be proved by parol evidence, has *not* been adopted.

10. The effect of substituting or adding a new plaintiff or defendant (as ruled in Kissen Lall *v.* Chunder Coomar, W. R., 1864, p. 152; Rajkissoree Dasi *v.* Buddun Chunder, 6 W. R., 298; and Srikissen *v.* Ramkristo, 10 W. R., 317) is declared.—Sec. 22.

11. The English-law rule of computing time where there are successive breaches of contract, a continuing breach or a continuing nuisance, is adopted.—Secs. 23 and 24.

12. The rule laid down by the House of Lords in Bonomi *v.* Backhouse

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the decisions of the Courts upon the Act of 1859, and (ii) of facilitating the application of the law by a schedule, of the different sorts[2] of suits and of certain applications, of their respective periods of limitation, and of the exact points of time from which such periods were to run. The expression 'so many years *from the time the cause of action arose*' in Act XIV of 1859, Sec. 1, clauses 2, 8, 11, 12 & 16, was too vague, at least for the lay public, and Act IX of 1871 attempted to remove this vagueness as much as possible.[3]

No doubt, in many, probably in most, instances,

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(9 H. L., 503) as to suits for compensation for an act which becomes actionable in case it causes damage, is declared by Sec. 25.

13. The decisions of the Bombay High Court, that periods of payment mentioned in instruments bearing a native date should be reckoned according to the native calendar, are disapproved, and it is laid down that all instruments shall be deemed to be made with reference to the English calendar.—Sec 26.

14. A rule for the acquisition of easements by positive prescription (referred to in the text) is introduced by Secs 27 and 28.

15. An express rule of extinctive prescription (referred to in the text) is applied to lands and hereditary offices.—Sec 29.

16. An application to execute a decree within the limited time keeps alive the decree, whether the application be made *bonâ fide* or not, and a new period is allowed from the date of the application or the issue of a notice on the judgment-debtor, but not from the time when a previous *bonâ fide* proceeding terminates. No. 167, Sched. ii, Act IX.

17. Longer time is allowed for the execution of a decree or order of which a certified copy has been registered. No. 168, Sched. ii, Act IX.

[2] But, as observed by Sir Richard Garth, in several unreported cases, suits or actions were *individualised*, rather than *classified*.

In specially mentioning a number of suits which were covered by the *general* clause of Act XIV (*viz.*, cl. 16 of sec. 1), Act IX shortened their periods of limitation from six to three years. Suits based on *quasi contracts*, suits for *mesne profits*, and suits for contributions are instances of this.

[3] Even the term "cause of action" was not used. The words "right to sue" were substituted for it. The term now occurs in Secs. 14 and 24 of Act XV.

the point adopted as the starting point, was in fact coincident with the accruing of the cause of action, but it was not necessarily so.[4]

The Act also repealed and re-enacted the limitation clauses of several special laws, and introduced new modes of interrupting the operation of the rule of limitation, such as acknowledgments signed by the debtor's *agent*, part-payments, and payment of interest by the debtor or his agent. To suits by Government it made the sixty years' limitation applicable in all the Courts and in all the Presidencies.

Extinctive and Positive prescription partially introduced.

In analogy to Sec. 34 of the English Statute 3 & 4 Will. IV, c. 27, Act IX further provided for the *extinguishment* of *right* to *land* by lapse of time; and in analogy to 2 & 3 Will. IV, c. 71, it expressly provided for the acquisition of easements by prescription.[5]

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[4] Gobindloll Seal *v.* Debendro Nath Mullick, 5 C. L. R., 527, 531; I. L. R., 5 Calc., 679

[5] Before Act IX of 1871 came into operation, (prescriptive) easements could be acquired in the Presidency-towns, by *twenty* years' uninterrupted user in accordance with the English law, which prevailed before the passing of the 2 and 3 Will. IV, c. 71. (Elliott *v.* Bhoobun, 19 W. R., P. C., 194; Pranjivandas *v.* Mayaram, 1 Bom., 148; Narrotum *v.* Ganapatrav, 8 Bomb., O. C. J., 69.) In the *mofussil* of the Bombay Presidency, enjoyment for a period of more than *thirty* years was required under Reg. V. of 1827, Sec. 1, cl. 1. (Ram Bhau *v.* Bhai Babushet, 2 Bom., 333; Anaji *v.* Morushet, 2 Bom., 334.) In the Bengal Presidency, the weight of authority was in favor of the position that, by analogy to the law of limitation, an enjoyment for at least twelve years was necessary. (Ameer Ali *v.* Joyprokash, 9 W. R., 91; Mohima *v.* Chundi, 10 W. R., 452; Kartik Sarkar *v.* Kartik Day, 11 W. R., 522.) In the Madras Presidency, a similar opinion was expressed by Scotland, C. J., in Ponnusami *v.* The Collector, 5 Mad., 6; but Justice Innes, in the same case, thought, that there being no common law on the subject, user for a period *shorter* than twelve years, accompanied by circumstances indicative of a grant, might be sufficient. (Subramaniya *v.* Ramchandra. I L. R., 1 Mad., 335)

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Sir James F. Stephen, in 1870-71, proposed to go further than the English law, and to lay down a *positive* rule of prescription in respect of *corporeal* property; and although he did not succeed in carrying out his proposal to its full extent, he was able to obtain, for the first time, some recognition of the doctrine of prescription by the Legislative Council of India,—*viz.*, the doctrine of extinctive prescription as to land, and of positive prescription as to easements.

Act XV of 1877.

Act IX of 1871 was shortly afterwards replaced by Act XV of 1877, which is the present law on the subject. This Act has extended the principle of extinctive prescription to moveable property, and the principle of positive or acquisitive prescription to profits *à prendre*. It further provides for various applications mentioned in the new Code of Civil Procedure (Act X of 1877, now replaced by the Act of 1882), and the schedule of applications in Act XV is accordingly more extensive than the corresponding portion of the Act of 1871. In other respects too Act XV is more elaborate than Act IX, and the former is in fact an improved edition of the latter. The following are some of the other additions and alterations introduced by Act XV :—

An express declaration that neither Act XV nor Act IX shall be deemed to affect any title acquired, or to revive any right to sue barred, under the latter Act or under Act XIV of 1859.—Sec. 2.

Successive or supervenient disabilities, as well as the disability of legal representatives, have been provided for. —Sec. 7.

The exceptions on account of legal disability, ineffectual but *bonâ fide* proceedings in a Court without jurisdic-

tion, concealed fraud, written acknowledgments, and the non-existence of a person capable of suing or of being sued, as well as the provision as to excluding from computation the day on which the right to sue accrues, have been extended to *applications*.—Secs. 7, 14, 18, 19, 17, and 12.

The Act has been applied to appeals from, and applications to review, decrees and orders of the High Courts in the exercise of their *original* jurisdiction.—Nos. 151 and 162, sched. ii. (These were formerly regulated by rules made under the Charter of 1865.)

Suits to enforce rights of pre-emption have been excluded from the operation of the exceptions as to legal disabilities, and the non-existence of a legal representative capable of suing or of being sued.—Secs. 7 and 17.

A purchaser for valuable consideration from an express trustee, *whether he had or had not notice* of the trust at the time of the purchase, is protected by twelve years' possession.—Sec. 10.

The time of a defendant's absence from British India is excluded in computing the period of limitation, *whether a summons could or could not be served* upon him during such absence.—Sec. 13.

A written acknowledgment in respect of *any* matter of right gives a fresh starting point. (Under Acts XIV of 1859 and IX of 1871, acknowledgments were effectual in respect of debts and legacies only).—Sec. 19.

The effect of a part-payment has been extended to all debts, *whether arising out of a contract in writing* or *not*. The payment must appear in the handwriting of the debtor, but it is no longer necessary that the payment should be endorsed on the instrument or on his own books or on the books of the creditor.—Sec. 20.

The cause of action, or rather the right to sue, is renewed *de die in diem* not only in the case of a continuing breach of contract and a continuing nusance, but also in the case of other continuing wrongs or torts.—Sec. 23.

In the case of suits for money lent under an agree-

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ment that it should be payable on demand, time runs from the date of the transaction, instead of from the date of the demand, as prescribed by Act IX.—Nos. 59 and 73, sched. ii.

The rules as to the estate of Hindu widows, and Hindu managers of joint estates, contained in Nos. 107, 124, and 142 of schedule ii, Act IX of 1871, are extended to Mahomedans where they have adopted the Hindu law of property.—Nos. 107, 125 and 141, sched ii.

Several classes of suits not specified in Act IX of 1871 have been expressly provided for, such as suits to set aside an order releasing or refusing to release property attached in execution (No. 11), suits to restrain waste (No 41), suits to compel a legatee to refund (No. 43), suits by wards to set aside sales by their guardians (No. 44), suits by a Hindu for a declaration of his right to maintenance (No. 129), and suits by mortgagees for foreclosure or sale (No 147). The Act has re-enacted the express provision of Sec. 21, Act VI of 1874, as to the execution of orders of Her Majesty in Council (No 180), and has added a general clause to cover applications not otherwise provided for (No. 178).

Certain numbers of schedule ii, Act IX, have been omitted as useless, such as Nos. 33, 73 and 79 of Act IX. No. 126 of Act IX has been rescinded, because a suit "by a Hindu governed by the law of the Dayabhaga to set aside his father's alienation of ancestral property" does not lie at all. No. 146, relating to suits for declaration of rights to easements, has also been left out. The distinction between applications for the execution of summary decisions, and of decrees or orders passed in Regular suits or appeals, has been abrogated, and No. 166 of Act IX has been omitted.

The periods of limitation have, in some cases, been *lengthened*, as in suits for infringing an exclusive privilege (No. 11 of Act IX, and No 40 of Act XV), for taking or wrongfully detaining moveable property (Nos. 26 and 34 of Act IX, and No. 48 of Act XV), for obstructing

a way or watercourse, and for diverting a watercourse (Nos. 31 and 32 of Act IX, and Nos. 37 and 38 of Act XV). The limitation periods have been *shortened* in a few cases, as in suits for establishing or setting aside an adoption (No. 129 of Act IX, and Nos. 118 and 119 of Act XV), and suits instituted by mortgagees in the Original Side of the High Court for possession of mortgaged immoveable property (No. 149 of Act IX, and No. 146 Act XV). The *starting point* of limitation has also been altered in some cases, as in suits to enforce a right of pre-emption (No. 10, shed. ii, Acts IX and XV); suits referred to in Nos. 32, 48, 90, 91, 92, 114, 118 and 127 of Act XV, in which the plaintiff's *knowledge* of certain facts is now made an ingredient of his cause of action; suits for money payable on demand, Nos. 59 and 73 of Act XV; suits for redemption, No. 148; and suits in the Mofussil by mortgagees for possession of mortgaged immoveable property (No. 135 of Acts IX and XV). Besides, any step in aid of execution of a decree or order gives the decreeholder a fresh start.—No. 179 (cl. 4), Act XV.

Act XV of 1877 has itself been slightly amended by Sec. 108, Act XII of 1879, Act VIII of 1880, and Sec. 156 of Act V of 1881.

# LECTURE IV.

## THE PLEAS OF *LACHES*, ACQUIESCENCE, AND LIMITATION.

The doctrine of *laches* in equity — The extent to which it is still applicable — *Laches* distinguished from acquiescence — *Laches* and acquiescence distinguished from limitation and prescription — The effect of *laches* in British India — Holloway, Turner, and West, JJ., on the doctrine of *laches* — Declaratory suits — Suits for specific performance and for injunction — Suits for redemption and mesne profits — Lord Chelmsford on *laches* and acquiescence — Lord Eldon on acquiescence — Act XIV of 1859 — Act I of 1877 — Conditions necessary to acquiescence — The morality of the plea of *laches* and acquiescence — The morality of the plea of limitation — The plea of limitation, whether it must be set up by the defendant — Under the English law — Under the Regulations of Bengal and Madras — Under Acts XIV and VIII of 1859 — Exception to the general rule — Under Acts IX of 1871 and XV of 1877 — The effect of a previous final decision — The plea of limitation in Courts of first appeal and of second appeal — Prescription need not be pleaded — Limitation may be pleaded even where the right is denied — Limitation against a joint cause of action — Limitation as against a defendant — Where the defendant pleads a set-off — Where the defendant is bound by a summary order — Prescription may be pleaded against a defendant as well as against a plaintiff — Promise not to plead limitation.

The doctrine of *laches* in equity.

ANOTHER doctrine, namely, that of *laches* and acquiescence, which is similar in its operation to the doctrine of limitation and prescription, requires some notice here.

Courts of Equity in England have always, on general principles of their own, discountenanced the *laches* and neglect of suitors, and refused relief unless sued for within a reasonable time and with reasonable diligence.[6] They did so, even before the 21st

[6] "A Court of Equity," said Lord Camden, "by its own proper authority, always maintained a limitation which prevented its being called into activity, unless at the requisition of conscience, good faith, and reasonable diligence." See Brown on Limitation, p. 514.

James I, cap. 16, provided for the limitation of actions at law. After the passing of that statute, equity has, except in cases of fraud, adopted its provisions so far as *analogy* makes them applicable to suits in equity. And since 1834, some suits, *viz.* suits to recover land or rent, are directly governed by the express provisions of 3 & 4 Will. IV, cap. 27. Where the matter, however, is of a purely equitable nature to which the statutes do not apply even by analogy, Courts of Equity still apply the doctrine of *laches* according to discretion regulated by precedents and the particular circumstances of the case.[7] If an argument against relief, which otherwise would be just, is founded upon simple *laches* or mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of such argument is tried upon principles substantially equitable.[8] Where no new rights and interests have meanwhile come into existence, or where the other party would not be unreasonably prejudiced by the remedy being afterwards asserted, such delay will, in general, be no bar to a plaintiff's right to relief.[9] Where the question is not one of title to recover property, and the plaintiff at the time of suit has no absolutely vested right to the particular relief which he seeks (it being discretionary with the Court to grant it or

The extent to which it is still applicable.

[7] Angell, sec. 26, note.

[8] Lindsay Petroleum Company *v.* Hurd, L. R., 5 P. C., 239.

[9] See Jamnadas *v.* Atmaram, I. L. R., 2 Bomb., 133, 138.

Messrs Darby and Bosanquet, citing Pickering *v.* Stamford (2 Ves., Jr., 272), say: "It may be stated, as a general rule, that where there is a statutory period of limitation, delay for any length of time short of that will not be an absolute bar to a plaintiff's right to relief, except where, by reason of such delay, innocent persons have been allowed to acquire interests which would be prejudiced by such relief being granted."

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not), the principles of equity, in the absence of a statutory provision, require that the party must come *promptly* and as early as he reasonably can. One important exception to this rule is the case of a person *in possession* under an equitable title, seeking (in a suit for specific performance) to clothe such title with the legal title. Thus, where a lessee under an agreement for a lease has enjoyed the property for years, if the intended lessor were to refuse the tenant his lease, or any of the benefits which he had a right to enjoy under it, the tenant might always come into a Court of Equity and compel the landlord to grant the lease.[10]

*Laches* distinguished from acquiescence.

But mere *laches* should be distinguished from *acquiescence*. "*Laches* and acquiescence," says Mr. Banning, "are often inexactly used as identical in meaning. In fact, however, there is a great distinction between them."[1] Lapse of time or delay in suing, unaccounted for by disability, ignorance (of fact, if not of law), or other circumstances, constitutes *laches*.[2] *Laches* is merely passive, while even indirect acquiescence implies almost active assent.[3] *Laches*, or delay, is evidence of acquiescence when the conduct of the parties, during the interval, raises a presumption of assent. Acquiescence,—that is, indirect acquiescence,—has been defined as "quiescence under such circumstances as that assent may

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[10] See Clarke *v.* Hart, 6 H. L. C., 633; Juggernath Sahoo *v.* Syud Shah, L. R., 2 I. A., 48; 23 W. R., 99; Crofton *v.* Ormsby, 2 Sch. and Lef., 583, 603; and Ahmed Mahomed *v.* Adjein, I. L. R., 2 Calc., 323, 326.

[1] Banning on Limitation, p. 246.

[2] Lewin on Trusts, 7th edn., p. 713; Darby and Bosanquet, pp. 196 and 197.

[3] Banning, p. 246; Lewin, p. 744.

be reasonably inferred from it."[4] The doctrine of acquiescence is based on the rule of equitable estoppel, or estoppel *in pais*.[5]

Generally speaking, the rule is that, if a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. If a party has an interest to prevent an

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[4] Lewin, p. 744.

Direct acquiescence is, where the act complained of was done with full knowledge and *express* approbation of another, in which case a Court of Equity will not allow that other to seek relief against the very transaction to which he was himself a party. Indirect acquiescence is where a person, having a right to set aside a transaction, *stands by* and sees another dealing with property in a manner inconsistent with that right, and makes no objection, when also a Court of Equity will not relieve; but in the latter case the Court not only looks to the conduct of the person who stands by, but also considers how far the person in possession of the property has any just claims to the protection of the Court. Where, for instance, the possessor lays out his money with a full knowledge that the property which he improves belongs to another then it is said he makes the outlay to his own cost. (See Lewin, pp. 744 745.) It may be here observed, that in British India if the person who makes the improvement is not a mere trespasser, but is in possession under any *bonâ fide* claim of an absolute title, he is entitled (at the option of the lawful owner) either to remove the materials or to obtain compensation for the value of the improvement, independently of any *proof* of acquiescence on the part of the owner. Thakoor Chunder *v.* Ramdhone, 6 W. R., 228, F. B. See also Sec. 51 of Act IV of 1882, the Transfer of Property Act, and Sec. 2, Act XI of 1855, which mitigated the rigour of the English law on this subject.

[5] Sec. 115 of the Indian Evidence Act is concerned with estoppels *in pais*, as opposed to estoppels by matter of record and estoppels by deed.

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act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license. (*Per* Lord Campbell Chancellor, in *Cairncross* v. *Lorimer*, 3 Macq. H. L. C., 892.)[6] If a person, having a right, stands by and sees another dealing with the property inconsistently with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is properly acquiescence. (*Per* Lord Cottenham in *Duke of Leeds* v. *Earl Amherst*, 2 Phill., 117, 123.)[7] If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce. (*Per* Lord Wensleydale in *Archbold* v. *Scully*, 9 H. L. C., 348, 383.)[8] The party so acquiescing cannot afterwards insist on his strict legal right. It would be unconscientious for him to do so, and interference on his behalf would be refused, even though his right to sue might not be barred by any law of limitation.[9]

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[6] See I. L. R., 1 All., 85.

[7] See Brown, p. 516; and Banning, p. 245.

[8] See Darby and Bosanquet. p. 197.

[9] But consent or acquiescence cannot enlarge the jurisdiction and powers of the Court (Srimati Anundo Moye *v.* Dhurendro, 1 W. R., 103. 106; Aukhil *v.* Mohiny, I. L R., 5 Calc., 489; Quiros' case, I. L. R., 6 Calc.. 83); nor. generally speaking, alter the nature and operation of a decree in execution. (24 W. R.. 25; I. L. R,, 1 All., 368, but see Sadasiv *v.* Ramalinga. 24 W R., 193, 197, P. C.)

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*Laches* and acquiescence distinguished from limitation and prescription.

*Laches*, like limitation, deprives the plaintiff of his remedy. Acquiescence, like prescription, destroys his right. But *laches* and acquiescence depend upon general principles, while limitation and prescription depend upon express law. The former are conclusions drawn from the facts of each particular case, while the latter are matters of inflexible law. A positive law of limitation and prescription applies even when there is no actual acquiescence or *laches*.

*Laches* and acquiescence, again, may be pleaded against either a plaintiff or a defendant, but limitation may be pleaded against a plaintiff only.

The effect of *laches* in British India.

As the law of limitation in British India is directly applicable to all kinds of actions and suits, simple *laches* or delay for any length of time, short of the law-defined period, will not be an absolute *bar* to a plaintiff's suit for relief.[10] But a considerable delay, if unexplained, may raise a presumption[1] against the right which the plaintiff seeks to enforce, and induce the Court to look with very great jealousy at the evidence produced in support of it.[2] Such *laches* may also be a ground for refusing a relief which the Court has a discretion to grant or refuse,[3] specially where innocent persons would be

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[10] "Where there is a statute of limitations, the objection of simple *laches* does not apply."—See Archbold *v.* Scully, 9 H. L. C., 348; see also 23 W. R., 99; and I. L. R. 2 Bom., 133. 138.

[1] Modhusudan Sandial *v.* Suroop Chandra Sircar, 7 W. R.. P. C., 73. See also Sel. Rep., Vol. V, p. 123, and Vol. IV, pp. 89, 130. cited in Macpherson's C. P., Appx., 203; and Sham *v.* Kishen, 18 W. R., 4, P. C.

[2] Ameerunnissa *v.* Ashruffunnessa, 17 W. R.. P. C, 259.

[3] The jurisdiction of the Courts in India to decree the specific performance of contracts and the rectification or cancellation of instruments, to grant injunctions, and to make declarations of status or right, is discretionary. See Act I of 1877, Secs. 12, 22. 31, 42, and 52.

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unduly prejudiced by such relief being granted;[4] and where the case is one to which the law of limitation does not extend (as where the *defendant*[5] is guilty of laches), long unexplained delay in enforcing a particular right may be the basis of a conclusive presumption of a release or of something done which if done is subversive of the right.[6] Where there is a statutable bar applicable to an analogous case, the Court will not, as a general rule, entertain such a presumption within a less time than the period fixed by the statute.[7]

Where mere laches is insufficient to exclude a claimant from relief, it may yet be ground for depriving him of costs,[8] or for reducing the rate of interest claimed, when such interest is awarded by way of damages.[9]

Holloway, Turner, and West, JJ., on the doctrine of *laches*.

The doctrine of *laches* and acquiescence in India has been fully discussed in *Uda Begham* v. *Imamuddin* (I. L. R., 1 All., 82) and in *Peddamathulaty* v. *N. Timma Reddy* (2 Mad., 370). Justice Holloway, in the latter case, lays down, that where the statute of limitation applies, mere laches short of the pres-

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[4] Pickering *v.* Stamford, 2 Ves. Jr., 272. See also Lindsay Petroleum Company *v.* Hurd (L. R., 5 P. C., 239) and Durell *v.* Pritchard (L R, 1 Ch., 244), both of which are referred to in Jamnadas *v.* Vijbhukan, I. L. R., 2 Bom. 133, where the Court held that an unexplained delay of ten months (after protest, &c), which is not shown to have *prejudiced* the defendant, does not disentitle the plaintiff to a mandatory injunction for the demolition of a building erected so as materially to obstruct the plaintiff's light

[5] Ram Narain Chakerbutty *v.* Poolin Behary, 2 C. L. R., 5. See also Sunt Lall *v.* Bhurosee, 18 W. R., 57.

[6] Lewin, p. 735

[7] *Ibid*, p 740

[8] Archbold *v.* Scully. Brown, p. 515; Mohun *v.* Bebee, 2 W. R., P. C., 9.

[9] Juala *v.* Khuman, I. L. R., 2 All., 617.

cribed period is no bar whatever to the enforcement of *a right absolutely vested* in the plaintiff at the period of suit. Justice Turner, in the other case, assents to this dictum with the qualification that it applies to cases in which a suitor seeks some relief, which, if he proves his case, the Court is bound to grant, and has no discretion to refuse. In a Bombay case—*Jamnadas* v. *Vrijbhukan* (I. L. R., 2 Bomb., 133) —Justice West lays down, that even where a plaintiff sues for a mandatory injunction, his legal right to relief continues until it is barred by limitation, that the Courts cannot lay down any shorter period for its assertion, and that the discretional power of the Court as to injunctions cannot, by reason of mere delay, be exercised *against* the plaintiff, except where new rights and interests have meanwhile come into existence, or where the other party will be unduly prejudiced by the relief being granted after such delay.

Declaratory suits.

In *Mrino Moyee Dabee* v. *Bhubon Moyee Dabee* (23 W. R., 42, 44), Sir Richard Couch, C.J., expressed an opinion to the effect that, in a *declaratory* suit, the Court will, in the exercise of the *discretion* which it has, decline (in the absence of special circumstances) to make a decree, even if a lesser time than the full period of limitation has elapsed.

Suits for specific performance and for injunction.

In an application by a charterer against the master of a ship for an *interim* injunction, Justice West said: —"I am the more disposed to refuse the application here, because it might have been made three days ago, and is now made quite at the eleventh hour (*Hazee Abdullah* v. *Haji Abdul Bacha*, I. L. R., 6 Bomb., 5). In *Ahmed* v. *Adjim* (I. L. R., 2 Calc., 323), Sir Richard

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Garth assumes that the doctrine of *laches* does apply to a suit for the specific performance of a contract, even if it is brought within the statutory period.

Suit for redemption and mesne profits.

In a suit by the representatives of a mortgagor, instituted more than fifty years after the mortgage, for recovery of possession of the mortgaged property, with six years' mesne profits, on the ground that the mortgage-debt had been satisfied by the usufruct of the property, their Lordships of the Privy Council, referring to the main question in the case, say:—"The question is one of *title*, and the right to assert that title is to be determined by the law of limitation as it stands. The law wisely or unwisely has given to mortgagors the long period of sixty years within which to bring their suit, and no Court of Justice would be justified in diminishing that period on the ground of the *laches* of the party in the prosecution of his rights." But the defendants, who were in possession for about eleven years, being (innocent) purchasers for a valuable consideration without notice of the plaintiff's title, their Lordships, in the exercise of their discretion, refused to award any mesne profits *before* the date of suit, on the ground of plaintiff's very great *laches*, although the claim for such profits was not barred by Act XIV of 1859, the law of limitation then in force. (*Jugunnath Shahu* v. *Syed Shah Mahammed*, 23 W. R., P. C., 99.) As mesne profits are in the nature of damages, the plaintiffs had no absolutely vested right to them at the date of suit, and it was considered inequitable to award them under the circumstances of the case.[10]

[10] In Nilcomul *v.* Gunomonee (15 W. R., P. C., 38, 41) it was considered

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Lord Chelmsford on *laches* and acquiescence.

The principles which guide Courts of Equity in England[1] are thus stated by Lord Chelmsford :— "When a person is obliged to apply for the *peculiar relief* afforded by a Court of Equity to enforce the performance of an agreement, or to declare a trust, or to obtain any other right of which he is not in possession, and which may be described as an executory interest, it is an invariable principle of the Court that the party must come promptly, that there must be no unreasonable delay, and if there is anything that amounts to *laches* on his part, Courts of Equity have always refused relief. With regard to interests which are *executed*, the consideration is entirely different. There mere *laches* will not of itself disentitle the party to relief from a Court of Equity, but a party may by *standing by*, as it has been metaphorically called, waive or abandon any right which he may possess, and which, under the circumstances therefore, Courts of Equity may say he is not entitled to enforce ; where, therefore, on principles peculiarly equitable, a person applies to a Court of Equity to do for him that to which his *bare vested rights* would not entitle him to, a Court of Equity is entitled to say, and does say, 'you are entitled to no favor, you were bound to come within a reasonable time.'"[2]

open to the defendant to show any special case, by way of appeal to the *equity of the Court*, to shorten the account which otherwise would have to be taken of the mesne profits claimed by the plaintiff.

[1] The Plea Side and the Equity Side of the Supreme Courts in the Presidency-towns represented, respectively, the Common Law Courts and the Equity Courts of England. The High Court, in its Original Side, exercises both jurisdictions ; since the Judicature Acts of 1873, there has been a fusion of law and equity in England. The Mofussil Courts here were, and are still, in one sense, Courts of Law as well as of Equity.

[2] Clarke *v.* Hart, 6 H. L. C., 633.

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Act I of 1877.

But the doctrine of acquiescence operating as an equitable estoppel is, on general principles, applicable to suitors in *every* Court, and cannot be restricted by a doubtful implication.[9] And now the Specific Relief Act, Sec. 56, expressly enacts that where there is a continuing breach of an obligation (whether arising out of a contract or not), an injunction to prevent it cannot be granted, if the applicant has *acquiesced* in it. Where there is more than mere *laches*, where there is conduct or language inducing

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*delay*. In the latter case one of the Judges held, that the doctrine of *laches* of the English Courts of Equity does not apply to this country.

[9] It may be here observed that the provision of Sec. 16 of Act XIV of 1859 was not re-enacted in Acts IX of 1871 and XV of 1877, and that, in Sir James Colvile's Bill, Sec. 16 of Act XIV of 1859 was not confined to the Supreme Courts. Section 24 of the original Bill and Sec. 27 of the revised Bill ran as follows:—"Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of *any* Court in refusing equitable relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act." The words "established by Royal Charter" were added to the word 'Court' at the time of the passing of the Bill. The Indian Law Commissioners, in their Report dated the 1st October, 1842, say:—"We have introduced a provision corresponding with Sec. 27 of the Statute 3 & 4 Will. IV, cap. 27, to preserve any rule or jurisdiction of any Court by which equitable relief may be refused on the ground of acquiescence or otherwise in the party seeking it. This provision seems to be necessary with respect to Her Majesty's Courts; while it may be applicable also in cases falling under the jurisdiction of the Company's Courts. For example, in the case of a person suing in one of the Company's Courts to recover land of which, through fraud or mistake, he had been led to make a conveyance to another, praying that the conveyance may be considered void on the ground of such fraud or error, if it should appear that he had been for some time aware of the alleged fraud or error, and that he had, notwithstanding, by his conduct acquiesced in the adverse possession, as by encouraging the possessor to build upon the land, or otherwise to lay out money in improving it, we conceive that the Court would think itself justified in refusing the remedy and relief sought by him, although not barred by prescription, on the ground that he had by overt acts given an after-confirmation to the deed which his plaint impugned."—See Thompson on Limitation, 2nd ed., p. 302.

a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled, in the mofussil as elsewhere, to plead acquiescence; and the plea, if sufficiently proved, ought to be held a good answer to an action, although the plaintiff may have brought his suit within the period prescribed by the law of limitation.[10]

Conditions necessary to acquiescence.

In order that acquiescence may have the effect mentioned above, the following conditions must be fulfilled.[1]

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[10] Uda Begham *v.* Imamuddin (I. L. R., 1 All., 82), where the Allahabad Court quotes Cairncross *v.* Lorimer, 3 Macq. H. L. C., 829; and Ramsden *v.* Dyson, L. R., 1 H. L., 129.

[1] See Lewin on Trusts, 7th ed., pp. 450, 789, and 790; Brown on Limitation, p. 516; Darby and Bosanquet, p. 197. As to knowledge, see Jehangir *v.* Shamji, 4 Bomb., 185; Savaklal *v.* Ora, 8 Bomb., 77; Dharamji *v.* Gurroo, 10 Bomb., 311; Bhoobun *v.* Elliott, 6 B. L. R., 85; Juggobondhu *v.* Kurum, 22 W. R., 341; Langlois *v.* Rattray, 3 C. L. R., 1. The weight due to a submission to an adverse title depends on the just belief, that the parties whose interests are affected by acquiescence possess knowledge of their right, means to enforce it, and counsels how to set about resisting a step injurious to it, which are ordinarily in the possession or reach of either of two rival claimants. A presumption by acquiescence in a rival claim, from the mere noncontestation for a limited time of an adverse title, is not pressed against an infant or a Hindu female.—Ramanani *v.* Kulâûthi, 14 Moo. I. A., 346; 17 W. R., 1. Where there is a fiduciary relation (as there is between an attorney and his client) acquiescence will not be lightly inferred from the delay of the *weaker* party in enforcing his right against the other. See Monohor *v.* Ramanath, I. L. R., 3 Calc., 473, 483.

Mr. Collett, in his Commentary on the Specific Relief Act, 1877 (p. 354), writes:—"The following have been said to be the essentials to constitute such acquiescence as will make it fraudulent for a man to set up his legal rights: (1) A must have made a mistake as to his legal rights; (2) he must have laid out money or done some act on the faith of such mistaken belief; (3) B must have known of his own right which is inconsistent with that claimed by A; (4) B must have known of A's mistaken belief as to his (A's) rights; and (5) B must have encouraged A in his outlay or acts, either directly or indirectly, or by not asserting his own right. (Willmott *v.* Barber, 15 Ch. D., 96; Ramsden *v.* Dyson, L. R.,

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(*a.*) The party acquiescing must be *sui juris*, and not an infant or a lunatic.

(*b.*) He must have full knowledge or the means of knowledge of the material facts and circumstances of the case. (Knowledge on the part of an agent may be constructive knowledge on the part of the principal.)[2]

(*c.*) He must also, to a certain extent, be apprized of the law, or how the facts of the case would be dealt with if brought before a Court of Equity. But it may be doubted whether this condition is consistent with the general rule that a mistake of law is no excuse.

The morality of the plea of *laches* and acquiescence.

The plea of *laches*, as well as that of acquiescence proper, requires for its validity a finding of fact under all the circumstances of each particular case. Whether the plaintiff's delay is unreasonable, or whether his conduct has been such as to induce the defendant to alter his condition, whether there is mere *laches* (which is often looked upon as an inferior species of acquiescence), or whether there is acquiescence properly so called, must be determined differently under different circumstances. The bar of the law of limitation, on the other hand, is stringently applied to all cases alike, whether or not there is

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1 H. L., 129; Beauchamp *v.* Winn, L. R., 6 H. L., 223.) But once an act is committed, without such knowledge or assent, a right of action has accrued, and no lapse of time short of the period of limitation will bar it, though it may be that delay viewed as *laches* may make the Court decline a particular form of relief."

Commenting on cl. (*h*) of Sec. 56, Act I of 1877, the same author, at pp. 350-352, points out that the defence of acquiescence is applicable only to the case of a *continuing* wrong, or a *continuing* breach of contract, and not where each act, though the same in kind, is distinct and complete in itself.

[2] Elliott *v.* Bhoobun, 19 W. R., 194, P. C; Moran *v.* Mitter, I. L. R., 2 Calc., 58, 92.

actual *laches* or acquiescence. The plea of *laches* is, in this respect, more equitable than the objection of limitation, and the defence of acquiescence proper is not only equitable, but such as may be conscientiously and righteously urged in a Court of Justice. But the question of the morality of using the law of limitation as a defence is, under certain circumstances, susceptible of a different answer.

The morality of the plea of limitation.

Referring to the statute of limitations passed in the 21st year of James I, Lord Mansfield said:—"The debtor may either take advantage of the statute of limitations, if the debt be older than the time limited for bringing the action; or he may waive this advantage; and in *honesty* he ought not to defend himself by such a plea."[3] Speaking of the same statute Mr. Justice Story, in 1828, observed,[4] that "it had been a matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that the statute, instead of being viewed in an unfavourable light, as an unjust and discreditable defence, should have received such support as would have made it, what it was intended to be, emphatically a statute of repose." As no law can be (legally) unjust, it must be admitted that, from a purely *juridical* point of view, the plea of limitation is not, and cannot be, an unjust defence. But from an *ethical* point of view, it can hardly be denied that, if the defendant has no reason to doubt the (natural) justice of the

[3] Quantock *v.* England; see Angell, sec. 210.

[4] Bell *v.* Morrison; see *ibid*, secs. 23 and 212.

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claim made against him, and is able to satisfy it, he ought in point of conscience to do so. If, however, the defendant is dubious of the existence and justice of the claim, he may honestly and righteously plead limitation against it.[5] And where the plaintiff's delay and other circumstances have rendered it impossible for the defendant to discharge his obligation, he may with a safe conscience invoke the aid of the law.

If a particular statute of limitation not only bars the remedy, but *extinguishes the claim itself*, the *plaintiff* cannot, after the expiry of the limited period, conscientiously assert a right which (by the public law to which all rights are subject) is no longer his; and the question of the defendant's honesty does not arise any more than where the law makes it *imperative* on the Courts to take up the question of limitation whether raised by the defendant or not. And if the statute *transfers* the plaintiff's right to the defendant, he is no more bound in conscience to restore it to the plaintiff than a legal heir is bound to give up the inheritance to the next-of-kin, when in *natural* justice these latter appear to have a preferable claim.[6]

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[5] Paley, Lord Holt, and Lord Kenyon were of opinion that the plea of the statute was by no means generally dishonorable, and Lord Cranworth held, it might often be a righteous defence. See Brown on Limitations, pp. 20—22.

[6] But Vattel, who bases the law of limitation and prescription on the presumption of abandonment, says:—"If the *bonâ fide* possessor should discover with perfect certainty that the claimant is the real proprietor, and has never abandoned his right, he is bound, in conscience and by the internal principles of justice, to make restitution of whatever accession of wealth he has derived from the property of the claimant" (Law of Nations, Ch. XI). The possessor is certainly so bound to restore the property during the *course* of prescription, but not after the expiry of the prescriptive period. This is the opinion of the most learned of the Canonists. See Brown, p. 21.

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The plea of limitation, whether it must be set up by the defendant.

Reasons of public policy having dictated the enactment of the law of limitation, the Indian Legislature has, since 1871, expressly declared that, whether the defence of limitation be pleaded or not, the Courts, whether of first instance or of appeal, are bound to give effect to such law. (See Sec. 4, Act IX of 1871, and Sec. 4, Act XV of 1877, and the illustrations.) The bar of limitation cannot be waived, and suits and other proceedings *must* be dismissed if brought after the prescribed periods of limitation.

Under the English law.

It cannot now be contended that the law of limitation is a law passed in ease, or for the benefit of defendants, and that they may waive a law which is passed for their benefit. But, under English law, as well as under the Regulations and Act XIV of 1859, this question was not free from doubt.[7] It was first ruled that the Statute of James I, by its own force, operated as an absolute bar and without pleading it, but it is now settled law that the English statutes of limitation must be *pleaded* by the defendant at an early stage of the case if he wishes to avail himself of them, and that the Court will not *ex mero motu* raise the question of limitation, even if it appears on the face of the declaration that the cause of action accrued out of the limited time.[8]

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[7] This question is discussed in Payne *v.* Constable (1 B. L. R., O. C., 60); but Yachereddy's case (5 W. R., P. C., 114) does not appear to have been referred to by the Judges.

[8] See Angell, sec. 285; Darby and Bosanquet, p. 427; and Banning, p. 8. The provisions of the Code Napoleon differ from the Indian law and also from the English law. Under art. 2223, "*Judges* can *not* supply officially the argument resulting from prescription;" and under art. 2224, "prescription may be objected in *every stage* of the cause even before the Court of Appeal," unless the objector can be presumed to have renounced it.

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Under the Regulations of Bengal and Madras.

But the language of the Regulations (III of 1793 for Bengal, II of 1802 for Madras, and I of 1800 for Bombay) was much stronger than that of the English statutes. The Regulations *prohibited* the Courts of Adawlat from trying the merits of any suit, if the cause of action should have arisen twelve years before, unless the complainant could show by clear and positive proof that his case fell within one of the recognized exceptions. And in a case where it was urged that the plea of limitation not having been taken by the defendant on the pleadings, the lower Appellate Court was wrong in giving effect to it, their Lordships of the Privy Council observed, that the positive language of the Regulation *affected the jurisdiction* of the Court, and rendered it incumbent on the plaintiff, in pleadings conducted with any degree of regularity, to show by proper allegations in his plaint either that the cause of action did accrue within twelve years, or to bring himself within the other alternative stated in the Regulations; and it was the duty of the Court to give judgment against him when the cause came to a hearing, for defect of such allegations, unless that defect was supplied by the allegations in the pleadings of the opposite party.[9]

There is nothing in Bengal Reg. II of 1805 which affects the previous law in respect of the matter

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[9] Yachereddy Chinna *v.* Yachereddy Gowdepa, 5 W. R., P. C., 114, *per* Mr. Baron Parke.

It should be here observed that the language of Bombay Reg. V of 1827 is not at all prohibitory. So far as it was a law of limitation it merely gave the *defendant* a privilege. The bar of limitation was to be considered "a sufficient *defence*."

now under consideration.[10] That Regulation also *took away* from the Courts all *authority* to take cognizance of any suit whatever, if the cause of action accrued sixty years before the institution of the suit.[1] And the provision by which the ordinary period of twelve years was extended to sixty years expressly required that the plaintiff should set forth distinctly in his plaint or application the grounds on which he claimed such an indulgence.[2] Where certain proceedings before the Revenue Courts were not in the nature of a regular suit, their Lordships of the Privy Council applied the rule of limitation, although the plea had not been raised in the Courts below.[3] There being *no pleadings* in the case, the objection of the plaintiff that the defendant had not urged the bar of limitation was considered to be of a technical nature.

But in a regular suit in the ordinary Civil Courts for possession of submerged lands after their re-appearance (where it was very doubtful upon the facts found whether the plea of limitation under Reg. III of 1793, if it had been raised by the defendant, could have prevailed), the Privy Council refused to entertain the plea, on the ground that it had not been taken by the defendant in the Court of first instance, and that the plaintiff had no opportunity of meeting it by evidence.[4] This case, however, can-

[10] *Per* Justice Markby in 1 B. L. R., O. C., 53. Payne *v.* Constable.

[1] Chandrabullee Dabee *v.* Lukhee Debi Chowdhurani, 5 W. R., P. C., 1.

[2] Kissen Chunder Ray *v.* Ramkanaye Dass, 2 Hay, 55.

[3] Maha Raja of Burdwan *v.* The Government of Bengal, 4 Moo. I. A., 466. The principle of this decision is fully applicable to suits in the Courts of Small Causes, where there are no regular pleadings. See the judgment of Peacock, C. J., in Payne *v.* Constable, 1 B. L. R., O. C., 65.

[4] Mussamut Imam Bandi *v.* Hurgobinda Ghosh, 4 Moo. I. A., 403; (S. C.) 7 W. R., P. C., 67.

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not be supposed to lay down the broad and general rule that the Courts could not raise the question of limitation under the Regulations, simply because the defendant had not set up the bar and the plaintiff had closed his case;[5] such a supposition would be inconsistent with the observations of the Privy Council in other cases.[6]

It may be gathered from the decisions upon the Regulations of Bengal and Madras, that if the facts proved or admitted clearly brought the case within their provisions, the Courts were bound to give effect to them even if the defendant did not plead them.

Under Acts XIV and VIII of 1859.

Act XIV of 1859 enacted that no suit should be maintained in any Court of Judicature, unless the same was instituted within the prescribed period of limitation. After a number of conflicting decisions on the subject, it was distinctly held in 1868 that the plea of limitation under this Act did not involve a question of jurisdiction in the proper sense of the word.[7] But whether the defendant pleaded the law

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[5] See Justice Norman's judgment in Payne *v* Constable, 1 B. L. R., O. C., 60.

[6] The observations of Mr. Baron Parke in Yachereddy Chinna's case have already been referred to.

In Spooner *v.* Juddow (4 Moo. I. A., 353, 376), Lord Campbell says:—"If the Court is forbidden by law to try the cause, neither the new rules, nor any *omission* of the defendant, would give the Court jurisdiction over it. The facts ousting the jurisdiction having been brought judicially to the notice of the Judge, and with perfect regularity, he usurps a jurisdiction which does not belong to him if he proceeds and gives judgment for the plaintiff; therefore, on these facts coming out for the first time on the trial of an issue, though they may seem irrelevant to that issue, he must have power by directing a nonsuit or by some other means to stop the trial." In this case the question was one of *jurisdiction* in the strict sense of the term.

[7] Payne *v.* Constable, 1 B. L. R., O. C., 49.

of limitation or not, if it appeared upon the facts admitted or proved that the suit was barred by the law, the Court of first instance was nevertheless bound (independently of the provisions of the Civil Procedure Code) to hold that the suit should not be maintained unless it fell within one of the exceptions.[8] Act VIII of 1859, the Code of Civil Procedure, expressly required the plaintiff to state the time when his cause of action arose, and if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, to state the ground upon which exemption from the law was claimed. (See Sec. 26 of Act VIII of 1859, and the corresponding Sec. 50 of Acts X of 1877 and XIV of 1882.) The Code further made it the duty of the Court to reject the plaint, if, upon the face of it, or after questioning the plaintiff, the right of action appeared to be barred by lapse of time. (See Sec. 32, Act VIII of 1859, and the corresponding Sec. 54, Acts X of 1877 and XIV of 1882.) The written statements of defendants were required to be confined as much as possible to a simple narrative of the *facts* which were believed to be material to the case. (See Sec. 123, Act VIII of 1859, and the corresponding Sec. 114 of Acts X of 1877 and XIV of 1882.) The objection that the defendant had not specifically pleaded the law of limitation could not therefore be maintained when it appeared upon the facts that the suit was barred by the law. But if

[8] See the judgments of Peacock, C.J., and Norman, J., in Payne *v.* Constable. Justice Markby was of a different opinion. This was a Small Cause Court case to which the Code of Civil Procedure did not apply.

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this did not appear to the Court on the face of the plaint, or after examining the plaintiff, there was no express provision in the Procedure Code to show that the Court of first instance or other Courts on appeal were bound *ex mero motu*, without plea, to raise the question of limitation.[9]

It would appear that, speaking generally, the plea of limitation under Act XIV of 1859 was allowed to be taken up for the first time even in special appeal, provided the facts which raised the plea were admitted or found, and no further investigation was necessary to ascertain them.[10] This general rule was not observed, if a previous erroneous but final proceeding between the parties precluded the Court from applying, or estopped the defendant from taking advantage of, the Act. Thus, where the judgment in a previous suit for partition between A on the one hand, and A's father and brother on the other, erroneously determined that, under the Mitakshara, A was not entitled to sue until after his father's death, and the

Exception to the general rule.

[9] See Moru bin *v.* Gopal bin, I. L. R., 2 Bomb., A. C., 120. Sec. 4 of the Limitation Acts of 1871 and 1877, however, now makes it imperative on the Courts to dismiss a suit or other proceeding instituted after the prescribed period, although limitation has not been set up as a defence.

[10] See Narsu *v.* Krisna, 1 Mad., 358; Ramnath *v.* Vaithalinga, 2 Mad., 238; Sabuji *v.* Rajasangi, 2 Bomb., 169; Dwlata bin *v.* Biru bin, 4 Bomb., A. C., 197; Ram Dhan *v.* Ram Ruttan, 10 W. R., 425.

But the Calcutta High Court (Justices Kemp and Glover), in Roy Dinkur *v.* Sheo Gholam (12 W. R., 215), held, that a plea of limitation (not involving a question of jurisdiction) could not, under Sec. 350, Act VIII of 1859, be taken, for the first time, in special appeal. And Westropp, C. J., in Moru bin *v.* Gopal bin (I. L. R., 2 Bomb., 120), doubted the correctness of the rulings in 2 Bomb., 162, and 4 Bomb., 197. As for Sec. 350, Act VIII of 1859 (corresponding to Sec. 578 of Acts X of 1877 and XIV of 1882), it may be observed that if that section applied, no decision of a lower Court on any question of limitation could be reversed by the High Court in appeal, regular or special.

defendants had for years enjoyed the benefit of that judgment, it was held by the Privy Council that A's brother was estopped by that judgment from setting up the bar of limitation to a fresh suit instituted by A after the father's death.[1]

Again, where a case was (on special appeal) remanded to the lower Court for the trial of a particular issue on the *merits*, it was held by four Judges of the Bombay High Court, that the plea of limitation, even if apparent on the face of the record, could not be raised for the first time in a second special appeal from the judgment of the lower Court after the remand.[2]

But where a Court of first instance decided the issue of limitation under Act XIV of 1859 in favor of the plaintiff, and the other issues against him, and the Appellate Court, *without passing any judgment* on the question of limitation, remanded the case for further investigation, it was competent to the Appellate Court, when the whole case came before it ultimately in appeal, to try the question of limitation.[3]

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[1] Lukshman Dada *v.* Ram Chunder Dada, 7 C. L. R., P. C., 320. It should be observed that sec. 4 of Acts IX and XV had not to be considered in this case.

[2] Moru bin *v.* Gopal bin, I. L. R., 2 Bomb., 120.

[3] Niljaree *v.* Mojubullah, 19 W. R., 209.

On the subject of the effect of an order of remand, see Moonshi Buzl Rahim *v.* Sreenath Bose (6 W. R., 198); and Musst. Phool Kumari *v.* Woonker Persad, 7 W. R., 67. In this latter case, Peacock, C.J., observed, that the remand order was *not intended to exclude* the defendant from a further finding on the issue of limitation upon the facts as they should appear upon the *new trial* ordered by the Appellate Court.

In Mirza Himmut Bahadur *v.* Govinda Panday (5 W. R., 91, F. B.) it was held, that submission to a remand order by the lower Appellate Court for a trial on the merits, does not preclude the defendant from raising the question of limitation in special appeal.

LECTURE IV.

Under Acts IX and XV.

And now, the illustrations of sec. 4, Acts IX of 1871 and XV of 1877, make it the *duty* of the *Court*, whether Original or Appellate, to dismiss suits and other proceedings barred by limitation, whether limitation is pleaded by the defendant or not, and it would seem even when defendant confesses judgment.[4] But where a suit or other proceeding is barred by limitation, if an *order* be made in it by a Court having competent jurisdiction to determine the question of limitation, and such order, overruling or ignoring the objection, directly or indirectly determines that the suit or proceeding is *not* barred, the order, unless reversed upon appeal, is valid and binding. And the Court which passed the order, or even a higher Court, cannot in a subsequent stage of the *same* case dismiss the suit or proceeding, although such order was erroneous in point of law.[5] Remanding a case, on appeal, for the trial of a special issue on the merits, is indirectly or constructively determining that the suit is not barred by limitation.[6] Ordering the attachment of the debtor's property in execution of a decree, is constructively determining that the application for execution is not barred by the Statute.[5] And if the order of remand or attachment becomes *final* by reason of no appeal having been preferred against it, notwithstanding the discovery at a later stage of the case that the suit or application

The effect of a previous final decision.

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[4] See the ruling of the Punjab Chief Court in Jaimal Singh *v.* Bhaga, cited in Rivaz on Act XV of 1877, p. 15.

[5] Mungul Pershad *v.* Grijakant, 11 C. L. R., P. C., 113.

[6] Moru bin *v.* Gopal bin, I. L. R., 2 Bomb., 120, 131. Sec. 4, Acts IX of 1871 and XV of 1877 would not, it is submitted, alter the rule laid down in this case.

is barred by limitation, it is not competent to that Court or even an Appellate Court to dismiss it on that ground.

Again, where a suit for the recovery of a principal sum with interest, though barred by limitation, is erroneously decreed for the plaintiff, and the defendant appeals only as to the interest ordered to be paid, the decree as regards the principal having become *final*, and the *whole* case not being before the Appellate Court, the suit cannot be dismissed *in toto*, on the ground that it is barred by limitation.[7] So, if some of the defendants appeal against a decree obtained by the plaintiff in a suit which is barred by the Statute, and the provisions[8] of sec. 544 of the Civil Procedure Code of 1877, or of 1882, do not apply, the Appellate Court cannot, on the ground of limitation, reverse such decree in favor of the other defendants who have allowed the decree to become *final* as against them. But a legally erroneous decision in one case between A and B, that A's cause of action has not yet arisen, will, not probably, prevent the Court in a *second* case between the same parties from holding that, under the *present* law, the suit is barred by limitation, though it would not be barred if the decision in the first case were cor-

[7] Alimunnissa *v.* Syed Hossein, 6 C. L. R., 267. In this case, the High Court did not entertain the question of limitation, because the appeal was not upon the *whole* case. But might not the Court have dismissed that portion of the claim against which an appeal had been preferred, if such portion was barred by limitation? See I. L. R., 9 Calc., 635.

[8] Where *some* of the defendants have appealed against the *whole* decree, an Appellate Court is allowed to reverse or modify the decree in favor of *all* the defendants, provided the decree proceeds on any ground *common* to all of them.

LECTURE IV.

The plea of limitation in Courts of 1st appeal and of 2nd appeal.

rect. The defendant may or may not be estopped[9] by the decision in the first case from setting up the statute, but the Court, it is apprehended, will not be precluded by it from applying the law to the second case. A Court of Regular Appeal may or may not allow new evidence[10] to be taken on the question of limitation, but if it finds the necessary facts, it is bound to dismiss the suit as barred, except, perhaps, where it is clearly precluded from doing so by some other imperative rule of law applicable to the particular circumstances of the case. These remarks apply also to second or special appeals, provided the facts on which the question of limitition depends are admitted or found by the lower Court. The Allahabad High Court has gone further, and in a recent case in which the plea of limitation, although abandoned in the lower Appellate Court, was urged in second appeal, Straight and Duthoit, JJ., said: "We must of necessity notice it, now that it is pressed here," and they remanded the case *for a finding of fact*,[1] which they considered necessary for determin-

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[9] See Lakshman Dada *v.* Ram Chunder Dada, 7 C. L. R., 320, P. C., and Parthasaradi *v.* Chinna, I. L. R., 5 Mad., 304. In this latter case it was held that the doctrine of "estoppel by verdict" was not applicable to the determination of an issue of law.

[10] See Morasu *v.* Krisna, 1 Mad., 358; also 3 Mad., 258.

[1] But it may be here remarked that even questions of jurisdiction, when depending upon questions of fact, cannot be taken up for the first time in special appeal (*per* Garth, C. J., in the Court of Wards *v.* Rupmanjari, 25 W. R., 260; and Peacock, C. J., in Lutifoonessa *v.* Babu Pulin, W. R., Sp. No., p. 31, F. B.; see also 5 W. R., P. C., 21, Bhai Chand *v.* Pertab). And that no question or objection should be permitted to be raised or taken in Special Appeal, which if raised in the lower Courts might have been met in those Courts by adopting a course which cannot be adopted in Special Appeal. (*Per* Couch, C. J., in Shib *v.* Nursing, 22 W. R., 352.)

ing the question of limitation. (*Bhawni* v. *Bisheswar*, I. L. R., 3 All., 846.) But it is nevertheless proper, that the preliminary objection of limitation, if not discovered by the Court at the first stage of the suit, should be taken by the defendant, at the earliest opportunity afterwards, in order to prevent the waste of time and money which a different course would entail.

Prescription *need* not be pleaded.

As to *prescription*, it may be observed that it is not necessary for the *defendant* to plead specially that the plaintiff's title has been extinguished by the Statute, the proper course in pleading is to traverse the owner's title.[2]

Limitation may be pleaded even where the right is denied.

A plea of limitation is not necessarily a mere plea of confession and avoidance. A defendant who does not admit the plaintiff's right may plead limitation as an alternative ground of defence.[3] The defendant may say that the plaintiff has no right to the thing claimed by him, and that even if he had any right, he is barred by limitation. In a suit for possession, if the defendant denies the plaintiff's right to possession, but fails to prove his own allegation of a right to remain in possession as tenant of the plaintiff, he may nevertheless avail himself of the plea of limitation on the ground of his actual possession as a trespasser.[4]

Under what circumstances, if any, a tenant, a

[2] De Beauvoir *v.* Owen, 5 Exch., 166; see Darby and Bosanquet, p. 389. The language of the English law (3 & 4 Will. IV, cap. 27, sec. 34) in this matter is similar to the language of sec. 29, Act IX of 1871, and sec. 28 of Act XV of 1877. As to when the *plaintiff* should plead prescriptive title, see Lecture XI.

[3] See Sootee Misser's case, 16th September, 1863, 2 Sevestre, p. 249.

[4] Dinomonee Debee *v.* Doorgapersad, 21 W. R., 70, F. B.

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trustee, a mortgagee, a servant or an agent may rely on the defence of limitation in a suit for possession by the landlord, the *cestui que trust*, the mortgagor or the master will be considered elsewhere.[5]

Limitation against a joint cause of action.

Where two plaintiffs sue upon a joint cause of action, and the defendant pleads limitation, if one of the plaintiffs is barred by limitation, the other cannot recover upon a separate cause of action, if any accrued to him at all. In order to succeed in the suit as brought, it must be proved that the joint cause of action is not barred.[6]

Limitation as against a defendant.

The provisions of the Limitation Acts do not in terms apply to defendants, so that a defendant may set up a right by way of *defence* which he would be precluded by limitation from setting up as a plaintiff by way of *substantive claim.*[7] In other words, lapse of time, where it does *not extinguish* the original right, is, generally speaking, no bar to a plea or defence based on such right.[8] But a plea of set-off, though not within the Statute of James I, is in England held to be within the equity of the Statute, and where such a plea is made, plaintiff can take advantage of limitation in the same manner as a

Where the defendant pleads a set-off.

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[5] See on this subject, Shaikh Nujmuddin *v.* Mr. Lloyd, 15 W. R., 232; and Madhub Chunder Giree Petitioner's case, I. L. R., 3 Calc., 243. Section 10, Acts IX of 1871 and XV of 1877. See pp. 147 *et seq.*

[6] Rajaram *v.* Luchman Persad, 8 W. R., 15, 21-22, F. B.

See also Ram Komal *v.* Nund Ram (10 W. R., 212), where it was held that in a joint claim for possession, plaintiffs must establish a joint enjoyment of the property within the period of limitation. As to suits by joint contractees, see Ram Sebuk *v.* Ramlal, I. L. R., 6 Calc., 815; 8 C. L. R., 487; and Kalidas *v.* Nathu, I. L. R., 7 Bomb., 221. If one is barred, all the others are in effect barred.

[7] Ram Narain *v.* Poolin Behari, 2 C. L. R., 5.

[8] Lindley's Thibaut, p. 184, and Appendix, p. cxv.

defendant. In this country, the provisions of sec. 111 of Act X of 1877 and of Act XIV of 1882 expressly require that the sum which the defendant claims to set off against the plaintiff's demand must be *legally recoverable.* And as a debt barred by limitation is not legally recoverable, it cannot be set off against the plaintiff's demand.

In some other cases, the defendant may be prevented by the doctrine of *presumption* from availing himself of a ground of *defence*, which but for the law of limitation he might have made a ground of *action.* Long delay in asserting the right to abatement of rent may induce the Court in a suit for arrears of rent to make a conclusive presumption against the defendant's plea.[9] And though limitation does not apply to a *defendant*, the question may arise whether or not he is bound by a summary award or order, which becomes final by reason of its not being contested within the time allowed by law. If the award or order becomes by lapse of time conclusive as to the *right* of the parties, even a plaintiff may derive advantage from such lapse of time.[10]

Where the defendant is bound by a summary order.

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[9] Ram Narain *v.* Poolin Behari, 2 C. L. R., 5.

[10] Badri Prosad *v.* Mohammed, I. L. R., 1 All., 381, F. B. In this case the defendant had not sued to establish his right after an order refusing to release his property from attachment, under sec. 246, Act VIII of 1859, which corresponds with sec. 283 of Act X of 1877 and of Act XIV of 1882. After the time prescribed by law for such a suit, the plaintiff who had purchased the attached property in execution was allowed to recover it from the defendant, on the ground that the latter was precluded from asserting his right. See also Babu Hit Narain *v.* Paltoo, 1 Shome's L. R., 173. In the following cases of *possessory* awards not contested by the defendant within time, the plaintiff's contention that the *defendant* was barred was not allowed. As to such awards by Revenue-Officers, see Shunkur *v.* Raja Ram, 4 W. R., 56; and Mohima Chunder *v.* Rajkumar, 10 W. R., 22. As to awards under Act IV of 1840 (= sec. 530, Act X

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Prescription may be pleaded against a defendant as well as against a plaintiff.

Whether the plaintiff acquires a title by positive prescription, or whether the defendant's right is extinguished by extinctive prescription, the law of *prescription* may, of course, be pleaded against the defendant. Suits to recover property comprised in certain possessory awards or orders of the Revenue or Criminal Courts (Nos. 45 and 46 of Act IX and Nos. 46 and 47 of Act XV) are, it is apprehended, within the purview of sec. 29, Act IX of 1871, and sec. 28, Act XV of 1877; and if so, a plaintiff, who had been in possession for three years under such an award or order, suing the defendant for possession will now be allowed to contend that the defendant's right to the property has been extinguished by the lapse of three years from the date of the award or order. But if the defendant recovered the possession of the property *within* the three years, or continued to be in possession for the three years, though he did not sue to set aside the award or order, the plaintiff suing for possession cannot benefit by the fact that three years have elapsed since the date of the award or order. See *Mohima* v. *Rajcoomar*, 10 W. R., 22.

Promise not to plead limitation.

A promise by the defendant that he shall not raise the plea of limitation to the plaintiff's claim frustrates the policy of the law, and is, therefore, standing alone, of no avail to bar the operation of the Statute. The defendant notwithstanding the promise is entitled to judgment if the suit on the original

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of 1872 = sec. 145, Act X of 1882), see Joogul Kishore *v.* Rajkishore, 3 W. R., 129; and Wise *v.* Ameeroonessa, 6 C. L. R., P. C., 249. But it should be remarked that none of these cases was decided under Act IX of 1871 or XV of 1877, which expressly *extinguishes the right* in some cases. See Lecture XI.

claim is brought after the time allowed by law.[1] A breach of a promise not to take advantage of the Statute, if made for a good consideration, would only entitle the plaintiff to bring a separate action for damages. And if the promise is made before the expiry of the period of limitation, the plaintiff's forbearance to sue would of itself be a good consideration.[2]

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[1] See p. 41, *supra;* and E. I. Co. *v.* Odit Churn Paul, 5 Moo. I. A., 44; Banning on Limitation, p. 52; and Darby and Bosanquet, p. 56. The rule as to the plea of *laches* is different. Where the defendant wrote that should his premises at any time become a nuisance, he was willing to assume that the plaintiffs were not damaged in their rights by delay,—it was held, that the defendants could not set up the *laches* of the plaintiff. Baxter *v.* Bower, cited in Gale on Easements, 5th Edition, p. 711.

Effect of a compromise in some cases.

A compromise between the parties, reserving as between them questions relating to a claim, which might arise out of the result of a pending suit, may, in certain cases, have the effect of preventing the operation of the Statute. See Syud Lutf Ali Khan *v.* Afzulunissa, 16 W. R., P. C., 20. In this case, which was decided under the old law, the plaintiff sued his co-sharer for money had and received by him for the plaintiff's use. In the previous suit (which was against a debtor of the co-sharers) it was necessary to decide whether the money had been paid to the defendant for himself only or for the plaintiff as well, and it was decided that the payment (so far as the debtor was concerned) was a payment in respect of the joint dues of the plaintiff and defendant. Until the decision of that suit, it could not (as between plaintiff and defendant) be said that the defendant had received any money for the plaintiff's use. *Cf.* Art. 62, Act XV, and I. L. R., 3 All., 170.

[2] 5 Moo. I. A., 44; and Darby and Bosanquet, p. 57.

# LECTURE V.

## TRIAL OF THE PLEA OF LIMITATION, AND THE BURDEN OF PROOF.

Plea of limitation tried separately from, and before, the merits — When tried together — When the questions of possession and title are tried together — Sec. 14, Beng. Reg. III of 1793 prohibited the trial of the merits of a suit barred by limitation — Practice before and after 1859 — The *onus* as to the issue of limitation is on the plaintiff — Rule as to the quantum of evidence required — When the *onus* is shifted — *Onus* in suits for *recovery* of possession — What the plaintiff is required to prove in ejectment — Where the land in suit is *beel-bharati* — Where it is a *khal* or *khal-bharati* land — In the case of waste or *jungle* lands — Suits by reversioners, &c. — Suits under art. 144, Act XV — The two Privy Council rulings considered by the High Courts of Calcutta, Bombay, and Allahabad — Where evidence of acts of ownership is forthcoming, and where it is not — Where possession under a title is proved, but not within the prescribed period — The opinions of Wilson and Field, JJ., on the question of *onus* — English authorities on the question of *onus* — Wrongful possession of land under a claim of right before diluvion — The Calcutta F. B. ruling on the question of *onus* — Where the land is incapable of actual enjoyment in any of the usual modes — *Onus* as to the date of a change in the condition of such land — Possession within twelve years need not be proved in suits under art. 144, Act XV — Proof of determination of particular estates — Of possession having been permissive — Of disability and fraud — When *onus* is shifted in pre-emption suits — *Onus* under arts. 133 & 134 of Act XV — Proof of exceptional circumstances.

Plea of limitation tried separately from, and before, the merits.

When tried together.

THE ordinary rule is, that the plea of limitation should be tried separately, and that, before the bar is removed, the plaintiff is not entitled to go into the merits of his claim. But there may be cases in which it will be necessary to investigate all the facts before the law of limitation can be applied to the claim. In such cases the plea in bar may be tried

in conjunction with the merits of the case.[3] In a suit brought to recover property from the hands of an alleged trustee, the defendant may deny the trust, and at the same time plead limitation. Here the Court must first determine that the case is not a case of trust at all before it determines the issue of limitation.[4] And in a suit by a person excluded from joint family property to enforce a right to share therein, it would be necessary to determine whether the property in suit is joint family property, before the provision of No. 127, Sched. II of the Limitation Act of 1877 could be applied to it. The plaintiff must, at the very outset of his case, show that he is a person excluded from joint family property in which he has a right to share.[5]

When the questions of possession and title are tried together.

And although it is *generally* proper to deal with the question of possession, for purposes of limitation, as distinct from the question of title, sometimes, as for instance, where the right to land which is unfit for actual enjoyment in the usual modes (*e. g.*, waste or jungle land) is disputed, it is often impossible to give evidence of acts of ownership or possession over the property, because it is uninhabited and

[3] See Mahammed Azim *v.* Sumeerooddin, 12 W. R., 286; Kasim *v.* Kedar Nath, 4 W. R., 364; Woodin *v.* Ambica, 3 W. R., 226. See also Rajab Saheb Perhlad *v.* Doorga Persad, 12 W. R., P. C., 14, in which the question of limitation could not be decided before deciding the question of the validity of the mokrurree pottah set up by the defendant.

[4] See the referring order of Justice Mitter in Dinomoney *v.* Doorga Persad, 21 W. R., 70, F. B. Under Act XIV of 1859, in Runjeet Ram *v.* Goburdhun, 20 W. R., 25, and under Act IX of 1871, in Radha Gobind *v.* Inglis, 7 C. L. R., 364, the Privy Council decided the question of title first.

[5] See Indernarain's case, reported in the *Englishman* of the 6th August 1875; Kalikishore *v.* Dhununjoy Roy, I. L. R., 3 Calc., 228; Obhoy *v.* Gobind, I. L. R., 9 Calc., 237. In this respect there is no difference between Act IX of 1871 and Act XV of 1877.

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uncultivated, and no acts of ownership by any one have been exercised over it. In such cases it is often necessary to try the question of title in conjunction with the question of limitation. In the doubt created by the absence of proof of possession by either party, the Court is obliged to resort to evidence of title, and to presume that the party who has the title has also the possession.[6] And even in the case of cultivated lands, if there is strong evidence of possession on the part of the plaintiff, opposed by evidence apparently strong also on the part of the defendant, the Court is sometimes obliged to try the question of title first, in order that it may decide the question of limitation, with the aid of the ordinary presumption that possession accompanies title.[7]

Where it was admitted that plaintiff had a share with defendant in a certain *mehal*, and the question was, whether the lands in dispute belonged to that or to defendant's separate *mehal*, the plea of limitation was held to have been correctly tried with the merits of the case. The defendant having admitted that the plaintiff was in possession of the whole of his share of the joint mehal, the suit could not be barred by limitation if the disputed lands formed a part of that mehal, while if they did not, the

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[6] Mohima Chunder *v.* Hurro Lal, I. L. R., 3 Calc., 768 ; (S. C.) 2 C. L. R., 364 ; Ram *v.* Kusu, 5 C. L. R., 481.

[7] Runjeet Ram *v.* Goburdhun, 20 W. R., 25, 30, P. C. There is no law which says that the issue of limitation must, in every case, be tried before the merits. See the referring order of Justice Mitter in Dinomoney *v.* Doorga Persad, 21 W. R., 70, F. B. In Radha Gobind *v.* Inglis, 7 C. L. R., 364, and Runjeet Ram *v.* Goburdhun, 20 W. R., 25, the Privy Council decided the question of title before that of limitation.

defendant would be entitled to judgment on the merits.[8]

But, generally speaking, in suits for ejectment based on boundary disputes, where plaintiff admits that he has been dispossessed, the issue of limitation is the first to be considered, and it is wholly independent of the boundary question. No proof of anterior title, such as would be involved in the decision of the boundary question in plaintiff's favor, can relieve him from the burthen of removing the bar of limitation by proof that the cause of action accrued to him on a dispossession within twelve years next before the commencement of the suit.[9]

Sec. 14, Beng. Reg. III of 1793 prohibited the trial of the merits of a suit barred by limitation.

Bengal Reg. III of 1793, sec. 14, and the corresponding enactments of the other Presidencies, prohibited the Courts from hearing, trying or determining the merits of any suit if it was barred by limitation. But even this provision did not prevent the Courts from considering the merits of the case so far as such consideration was necessary to determine the question of limitation,—that is, to ascertain if the suit was actually barred.

A literal interpretation of the section, however, might have prevented the Courts from going into the

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[8] Doorga Ram *v* Ratanmonee, 4 W. R., 61. A similar reason is given in 12 W. R., P. C., 14, which was a case for setting aside an alleged *mokrurree*.

[9] Maharaja Koonwar *v*. Nundo Lal, 8 Moo. I. A., 99; (S. C.) 1 W. R., P. C., 51. This case was decided under the Regulation of the Bengal Code. In Radha Gobind *v*. Inglis, 7 C. L. R., 364, P. C. (a case governed by Act IX of 1871 and Act VIII of 1859), where the land in dispute was *beel-bharati*, the first question raised and decided was the question of title. So also in Runjeet Ram *v*. Goburdhun, 20 W. R., 25, P. C. (a case of dispossession of a mouza, governed by Act XIV of 1859 and Act VIII of 1859), where the evidence of possession was conflicting.

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Practice before and after 1859.

merits of cases which could be, and were, decided on the issue of limitation. But the practice[10] of the Court was opposed to such *literal* interpretation. And now the language of the Limitation Acts since 1859 is in this respect very different. In *Tarakanto Banerji* v. *Puddomoney Dasee*,[1] their Lordships of the Privy Council overruled the decision of the Sudder Court on the question of limitation, and, finding that the merits had not been entered into in the Courts below, remarked, that it was much to be desired that, in appealable cases, the Courts below should, as far as may be practicable, pronounce their opinions on all the important points, so as to enable the Appellate Court to decide the appeal finally.

And in a later case the Calcutta High Court observes, that the objection of the special appellant to the effect that, when a case is decided on limitation, the Court cannot go into the merits, is untenable. There may be cases, specially such as are appealable to Her Majesty in Council, where it is very right that the merits should also be gone into, so that the Lords of the Privy Council may be in a position, if they overrule the decision on limitation, to hear at once the appeal on the merits, and so save the parties from the trouble and expense of remands to this country. The same principle applies, more or less according to the circumstances of the case, to all appealable suits.[2]

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[10] See Gholam Russool *v.* Musst. Mugglo, 1 Moo. I. A., 446, in which the Sudder Court tried both the questions, and their decision was affirmed by the Privy Council

[1] 10 Moo. I. A., 477; (S.C.) 5 W. R., P. C., 63.

[2] Shibo Doorga *v.* Syud Hossein, 6 W. R., 218; see also Rajah Lall *v.* Delputi, I. L. R., 5 Calc., 363; (S.C.) 5 C. L. R., 374, 379.

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The *onus* as to the issue of limitation is on the plaintiff.

It is a settled rule of law that it is for the plaintiff to show *primâ facie* that his suit or right of action is not barred by limitation.[3]

The Civil Procedure Code requires that the plaint should set forth the cause of action and when it accrued, and if the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the ground upon which exemption from such law is claimed. (Sec. 26, Act VIII of 1859; sec. 50, Act X of 1877 and Act XIV of 1882.)[4]

The Code further provides that, if the suit appear from the statement in the plaint to be barred by any positive rule of law, the Court shall reject the plaint.[5] (Sec. 32, Act VIII of 1859; sec. 54, Act X of 1877 and Act XIV of 1882.) Thus the plaintiff is under the necessity of satisfying the Court that his claim is not barred by lapse of time. Nor does this obligation cease when the plaint has been admitted. If the defendant plead limitation, or if, although he do not plead it, it appear to the Court upon the facts that the suit was commenced after the period of limitation had expired, the Court is bound to call upon the plaintiff to prove that he has not forfeited his right of action. A suit which is barred by limitation cannot be maintained in a Court of Justice. The words of the Law of Limitation as contained in Reg. III of

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[3] Mohammed Ibrahim *v.* M. B. Morrison, I. L. R., 5 Calc., 36, 37. See Wilby *v.* Hennan, 2 Cr. & M., 658.

[4] The Regulations of Bengal and Madras were *interpreted* as laying down the same rule. See Yacheraddy's case, 5 W. R., P. C., 114, *ante*, p. 92.

[5] In Raja Shaheb Perhlad *v.* Moharaja Rajendro Kishore, 12 Moo. I. A., 289; (S.C.) 12 W. R., P. C., 6, 19, their Lordships of the Privy Council say: "Section 32 (Act VIII of 1859) shows that the plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time."

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1793, sec. 14, and Act XIV of 1859, sec. 1, were distinctly *prohibitive*; and sec. 4, Acts IX of 1871 and XV of 1877, renders it *obligatory* upon the Court to dismiss a suit which is instituted after the prescribed period of limitation. If, therefore, any question or doubt on the subject arise, the plaintiff is bound *(primâ facie)* to satisfy the Court that it has not been induced to entertain a suit which the law has forbidden it to entertain.[6] The Court will, however, as respects the *quantum* of evidence required, consider the opportunities which in particular cases each party may naturally be supposed to have of giving evidence.[7]

Rule as to the quantum of evidence required.

In a suit for breach of contract, the plaintiff must prove that the breach of contract[8] or other event from which limitation commences to run occurred within the limited time.

Similarly, in a suit for a tort, the onus is on the plaintiff to prove that the malfeasance, misfeasance, nonfeasance or other event from which limitation commences to run took place within the prescribed period.

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[6] See Pandurang Govinda *v.* Balkrishna Hari, 6 Bomb., A. C. J., 125.

[7] Rajah Kissen Dutt *v.* Norendra Bahadur, L. Rep., 3. I. A., 85. In this case the question was whether a suit for redemption was barred by limitation, and it depended upon the further question whether or not the term for redemption fixed by the instrument of mortgage had expired before 1856. The defendant's case was that the instrument was lost in the mutiny, but that the term fixed by it had expired before 1856. It was held that the onus lay on the plaintiff to substantiate his case by giving some *primâ facie* evidence that the term did not expire before 1856, and that as the plaintiff had given such evidence, the burden of proof was shifted on the defendant, mortgagee, for it was *more in his power* to give accurate evidence of the contents of the instrument than in that of the plaintiff.

[8] See Taylor and Bell, 131; and Rajah Judoobhoosun *v.* Mr. T. J. Kinny, 3 W. R., S. C. C. Ref., pp. 9, 10.

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When the *onus* is shifted.

When the plaintiff's suit or proceeding is *primâ facie* within time, if the defendant alleges that the case is governed by a special clause allowing a shorter period of limitation, it is for him to satisfy the Court that the case comes under that special clause.[9] The burden of proof lies on the defendant, because he would fail if no evidence at all were given on this question on either side.[10] If the defendant wishes the Court to believe in the existence of particular facts, which if believed would operate as a bar to the suit, it is for him to prove those facts,[1] except perhaps when the facts are specially within the knowledge of the plaintiff.[2] And when the charge is made of *want* of *bona fides*, it certainly lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.[3]

In a suit on a bond or a promissory note payable at a fixed period *after demand*, where the plaintiff contends that no demand was made *anterior* to the period of limitation, the burden of proving an earlier demand lies on the party who pleads limitation.[4] But here, as in other cases, the plaintiff must show *primâ facie* that his cause of action arose within the limited time before the onus is shifted on the defend-

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[9] See Mohansing *v.* Conder, I. L. R., 7 Bomb., 478.

[10] See sec. 102, Act I of 1872.

[1] See sec. 103, Act I of 1872.

[2] See sec. 106, Act I of 1872.

[3] Benoderam Sein *v.* Brojendro Narain, 21 W. R., 97, P. C.

[4] See Ch. Div., 687, Brown *v.* Rutherford. A note payable "on demand" is immediately payable, but a note payable three months *after demand* gives no cause of action unless a demand has actually been made. See art. 72, Sched. II, Act XV of 1877.

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ant. It is not necessary to prove the earlier demand (or any other fact) by *direct* evidence. The evidence afforded by circumstances may be sufficient.[5]

In a suit under art. 127 of Act IX of 1871, by a Hindu excluded from joint family property, to enforce a right to share therein, when the plaintiff shows *primâ facie* that his case falls under that article (*Obhoy Churn* v. *Gobind Chunder*, I. L. R., 9 Calc., 237), it is for the defendant to show that the plaintiff claimed and was *refused* his share *more than twelve years before* the institution of the suit. (*Hansji* v. *Valabh*, I. L. R., 7 Bomb., 297.)

*Onus* in suits for *recovery* of possession.

When plaintiff alleges that he has been *dispossessed*, and sues to recover possession, the ordinary rule applied is that the onus is on him to prove possession and dispossession within the prescribed period. He is bound to satisfy the Court that he has had possession within that period, but it may not always be necessary for him to prove that possession by positive acts of ownership ; the Court may in some cases *presume* in his favor from the fact of *previous* title and possession.[6]

Speaking of suits for the recovery of immoveable property (under sec. 1, cl. 12, Act XIV of 1859), Sir Richard Couch, C.J., says : "It has been settled that the *plaintiff* must show that he or some one through whom he claims has had possession within

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[5] Ram Chunder Ghoshal *v.* Hemanginee Debi, 3 C. L. R., 336, 348 ; I. L. R., 4 Calc., 283 ; and Brown *v.* Rutherford, 14 Ch. Div., 687. An offer of payment of the principal or an actual payment of interest before suit has been considered sufficient to raise the *presumption* of a previous demand.

[6] Mohini Mohun Dass *v.* Kristo Kishore Dutt, 12 C. L. R., 337.

twelve years before the suit. If he sues for the recovery of immoveable property on the ground of having been dispossessed from it, he must show that he has come within twelve years from the time when his cause of action arose—the time when he was dispossessed. It is not enough for him to prove his title to the property which is the subject of the suit, and leave it to the defendant to show that the suit is barred by the law of limitation by proving when the plaintiff was last in possession. It has been considered, looking at the way in which the law of limitation is framed, that the plaintiff is bound to give evidence of that kind."[7] Applying this rule to suits for shares in joint family property (under cl. 13, sec. 1, Act XIV of 1859), it was held that the onus was on the plaintiff to show that he had possession of his share, or received payments on account of it, within twelve years from the institution of the suit.[8]

On the question of limitation in a case of ejectment (under Act XIV of 1859), the Bombay High Court[9] say: "The burden of proof being upon the plaintiff, what is he required to prove? Simply that the cause

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[7] Gossain Dass *v.* Seroo Kumari, 19 W. R., 192. This was also the rule in suits for ejectment governed by the Regulations. See Maharaja Koowar *v.* Baboo Nund Lall, 1 W. R., P. C., 51; (S.C.) 8 Moore's I. A., 199; also Rajah Shaheb Perhlad *v.* Budhu Sing, 12 W. R., P. C., 6, 19; Beer Chunder Joobraj *v.* Deputy Collector of Bhullua, 13 W. R., P. C., 22. It may be observed that, in all these three cases, the plaintiff admitted having been actually *dispossessed* by the defendant for ten or eleven years before the institution of the suit. Sir Richard Couch's remarks also evidently refer to suits for possession of immoveable property, when the plaintiff, while actually or constructively in possession of the property, has been *dispossessed* or has discontinued the possession.

[8] Gossain Dass *v.* Seroo Kumari Debia, 19 W. R., 192.

[9] In Pandurang Govinda *v.* Balkrishna Hari, 6 Bomb., A. C., 125.

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What the plaintiff is required to prove in ejectment.

of action accrued within the period of limitation made applicable to the suit.[10] This is by no means equivalent to saying that a plaintiff, in an action of ejectment, must prove that he has been in possession within twelve years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that period. If a man buy a piece of open ground, he is not bound to enclose it or to build upon it or formally to take possession of it; nor, if he does formally take possession of it, is he bound to proclaim by subsequent acts the continuance of his possession: so long as the land remains unoccupied, his rights are not interfered with, and he is not called upon to assert them. He has no cause of action, and there is no person whom he can sue. His cause of action accrues when *another person* takes possession of the land, and not before.[1] If he has omitted to take possession of the land himself, (he may not be able to treat the intruder as a trespasser, but) he can bring an action to eject him at any period within twelve years from the date of the intruder's occupation of the land."[2]

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[10] In exceptional cases, where the period of limitation runs from a time posterior to the accrual of the cause of action, the plaintiff need only show that he is within time from the starting point fixed by law. For an example, see No. 10, Sched. II, Acts IX and XV; and sec. 1, cl. 1, Act XIV of 1859. See Lekram Koer *v.* Janki, W. R., 1864, p. 285.

The cause of action in a pre-emption suit is the sale to a stranger, but the *punctum temporis* is not the date of the sale.

Suits by reversioners, &c.

[1] So also, in suits by a reversioner or remainderman, or by a person who is not entitled to immediate possession at the time when the defendant first takes possession of the property, the cause of action arises only when the estate falls into possession.

[2] Sir Richard Garth considers these remarks of Melvill, J., about possession to be applicable to all cases where the production of direct evidence of possession is either difficult or impossible (12 C. L. R., 262); Justice

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Where the land in suit is *beel-bharati.*

In a recent case[8] before the Privy Council, the plaintiff claimed certain lands included within the limits of a *beel*, or lake. The land so claimed had become dry and culturable during, at least, a part of the year. The proprietor of a neighbouring talook was the defendant, and he denied the plaintiff's title to the soil of the *beel*, and relied on adverse possession for more than twelve years before the institution of the suit. The plaintiff having given evidence of his ancestor's possession of the main talook to which the *beel* appertained, and proved his title to the soil of the *beel* itself, their Lordships said: "The question remains whether the disputed land had or had not been

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Wilson appears to consider them applicable to waste or unreclaimed lands (8 C. L. R., 130).

In the case supposed by Melvill, J., it is not stated whether the vendor has given up his own possession. If it is assumed that the vendor has given up possession, it follows that the vendee has, in the eye of the law, been in possession of the ground from the date of purchase, and he would be in a position to prove such possession. If the vendor being in possession does not actually or constructively deliver possession to the vendee, the latter must ordinarily bring his suit against the former or his representatives or assigns, within twelve years from the date of purchase. In a suit for possession, when the plaintiff, while in possession, has been dispossessed or has discontinued the possession, the cause of action being the dispossession or the discontinuance, the plaintiff must prove that he had lost possession within twelve years. Discontinuance of positive acts of ownership, however, does not necessarily amount to loss or discontinuance of possession in the eye of the law. A stranger must have entered into possession before the possession of the owner can (in the absence of express abandonment) be said to have discontinued.

Suits under art. 144, Act XV.

And in suits falling under art. 145 of Act IX of 1871 and art. 144 of Act XV of 1877, it is not necessary for the plaintiff to prove that he was in possession within the period of twelve years, provided the suit is brought within twelve years of the time when the possession of the defendant or his predecessor in interest became adverse to the plaintiff. Monwar Ali *v.* Unnoda Persad, I. L. R., 5 Calc., 644, P. C.; and Koran Sing *v.* Bakar Ali, I. L. R., 5 All., 1, P. C.

[8] Radha Gobinda Ray *v.* Inglis, 7 C. L. R., 364, P. C.

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occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff, by the operation of the Statute of Limitation. On this question, undoubtedly, the issue is on the defendant. The plaintiff has proved his title; *the defendant must prove* that the plaintiff has lost it by reason of his, the defendant's, adverse possession."[4]

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The two Privy Council rulings considered by the High Courts of Calcutta, Bombay, and Allahabad.

[4] This ruling at first sight appears to be opposed to other decisions of the Privy Council, specially to the decision in Maharaja Koowar's case, 8 Moore, 199; (S. C.) 1 W. R., P. C., 51. in which it was held that no proof of anterior title in the plaintiff can shift the onus upon the defendant of proving the time and manner of dispossession. See Kalichurn *v.* The Secretary of State, 8 C. L. R., 90; and Monmohun *v.* Mothora Mohun, *ibid*, 126, where the conflicting decisions are reconciled in two different ways.

In Kali Churn's case, Sir Richard Garth (incorrectly) assumed, that the plaintiff in Maharaja Koowar's case did not attempt to prove any possession at *any* time before suit, and added that, in Radha Gobind's case, the plaintiff *did prove* his ancestor's possession, though not within the statutory period. In Monmohun's case, Justices Wilson and Field distinguish the two Privy Council cases by pointing out that the second case related to land recently formed by the gradual drying up of a lake belonging to the plaintiff, while the first referred to land which was occupied and was from before susceptible of actual and visible possession. In a later case, Hafiz Mahomed *v.* Abdool Gunny, 12 C. L. R., 257 (F.B.), Sir Richard Garth distinguishes the two Privy Council cases by remarking that the second case proceeded upon the well-known rule that a title and *seisin*, when once established, must be presumed to continue, at least, in cases where there is no direct evidence of possession, and where such evidence is, from the nature of the case, either difficult or impossible to obtain, and by adding that the defendants who apparently had first brought the bed of the *beel* into cultivation, were presumably better able to prove when and how the cultivation had commenced. In the same case, Mitter, McDonell, Prinsep and Wilson, JJ., were of opinion that the distinction depended upon the character and condition of the land in dispute in the two cases; that if the land is incapable of any beneficial use, or if it produce some trifling profit now and then, if it is permanently or temporarily incapable of actual enjoyment in any of the customary modes, as by residence, or tillage, or receipts of a settled rent, the principle of presumption may be resorted to, and that the Privy Council gave the plaintiff in the second case the benefit of the presumption because the land was *beel-bharati*.

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Where it is a *khal* or *khal-bharati* land.

In Sunnud Ali's case (9 W. R., 124) Sir Barnes Peacock, C. J., pointed out, that when lands which are not in their nature capable of actual occupation (such as a *khal*) appertain to lands which are occupied, the possession of the former follows that of the latter; that, generally speaking, a *khal* would continue in the possession of the person in possession of the lands to which it appertains, until it dries up and becomes culturable; but if any one to whom it does not belong takes possession of it even before it becomes culturable, a cause of action accrues to the party entitled from the time of such wrongful possession; that the same law of limitation applies to *khals* and *bharat* lands as to other lands, though with regard to the former there might be more *difficulty in determining the time at which wrongful possession was taken;* that, looking to the nature of *khal bharat* lands and the presumption that the person in possession of the main land to which it appertains was by implication in possession of that which appertained to it until some one else took actual possession, *it would be for the defendant to show that he took possession of the land* at a time more than twelve years before the commencement of the suit; and that even in the case of such lands the Court had to try (with reference to these remarks) whether the plaintiff was in possession of

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In Moro Desai *v.* Ramchandra, I. L. R., 6 Bomb., 508, Melvill, J., refers to the apparent inconsistency of the Privy Council decisions, and without attempting to reconcile them, holds that the few remarks in Radha Gobind's case could not have been meant to upset the old rule applicable to ordinary cases of ejectment. But in Sarsuti *v.* Kunj, I. L. R., 5 All., 345, F. B., it has been held that, under the authority of Radha Gobind's case, proof of title is sufficient to shift the onus of proving extinction (of title by limitation) to the defendant.

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the land within twelve years before the commencement of the suit.[5]

In the case of waste or *jungle* lands.

As to the presumption of possession, Sir Richard Garth, C. J., in *Mohima Chunder Dey* v. *Hurrolal Sircar*,[6] says : "In some cases, as for instance where grants or leases have been made of waste or jungle lands and the right to these lands is disputed, it is often impossible to give evidence of acts of ownership or possession over the property because it is uninhabited and uncultivated, and no acts of ownership by any one have been exercised over it. In such cases it is often necessary, for the purpose of deciding the question of limitation, to rely upon very slight evidence of possession, and sometimes possession of adjoining land coupled with evidence of title, such as grants or leases ; and the Courts are justified in presuming, under such circumstances, that the party who has the title has also the possession."

Where evidence of acts of ownership is forthcoming, and where it is not.

Again, in *Rambandhu* v. *Kusu Bhatta*,[7] the learned Chief Justice observes that, as long as reliable evidence of acts of ownership is forthcoming, there is no difference between the proof of possession in the case of jungle or waste or uncultivated lands, and that in the case of cultivated lands, and such proof

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[5] As to the onus and the presumption in these and analogous cases, see 3 W. R., 73, 80, 82, Messrs. Watson & Co. *v.* The Government (jungle or uncultivated lands); 9 W. R., 124, Sunnud Alí *v.* Mussamut Kurrimoonissa (*khals* and *khal-bharati* lands); 11 W. R., 268, Mahomed *v.* Kurrim (*beel* lands); 16 W. R., 102, Raja Leelanund *v.* Mussamut Basseeroonnissa (jungle land); 24 W. R., 410, Moocheeram *v.* Bissambhur (unoccupied and exceedingly narrow strip of land); 8 C. L. R., 126, Monmohun Ghose *v.* Mothura Mohun Roy (reformed alluvial lands as opposed to new accretions).

[6] 2 C. L. R., 364.

[7] 5 C. L. R., 481, Rambandhu *v.* Kusu Bhatta.

is oftentimes forthcoming, as in the cutting down of trees, grazing of cattle, or putting up of boundary marks or fences, and the like.[8] But it does sometimes happen, that neither party to a suit has exercised any acts of ownership at all over the lands in question which are capable of proof, and then in the doubt created by such *absence of* proof or of reliable proof, the Court is obliged to resort to evidence of title, and to *presume* that the party who has the title has also the possession.[9] Where there is evidence of some acts of ownership, it would be right for the Court to decide the case upon that evidence, so far as the question of possession is concerned, without resorting to the proof of title.[9]

Where possession under a title is proved, but not within the prescribed period.

In *Kali Charan Sahu* v. *The Secretary of State*,[10] Sir Richard Garth, C. J., attempts to reconcile the Privy Council decision in 8 Moore's I. A., 199, with that in 7 C. L. R., 364, and remarks, that the laws of Limitation and Civil Procedure make no distinction between different kinds of land; that the presumption must in one case be the same as in another;

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[8] In Watson *v.* The Government, 3 W. R., 78, 80, Sir Barnes Peacock, C. J., referred to the habit of cutting or preserving the wood, gathering wax or wild honey, collecting sticklac, &c., as some evidence of possession of jungle lands.

[9] But even in suits for land which is cultivated or otherwise occupied, the ordinary presumption would be that possession went with the title. That presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession on the part of the plaintiff opposed by evidence apparently strong also on the part of the defendant, in estimating the weight due to the evidence on both sides, this presumption is sometimes regarded. 20 W. R., 25, P. C., Runjeet Ram Panday *v.* Goburdhan Ram Panday. In this case the plaintiff's suit was, with the aid of this presumption, held to be within time.

[10] 8 C. L. R., 90, Kali Charan *v.* The Secretary of State.

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that dispossession must mean the same thing in one case as in another; that the reason of the law applies equally in the case of cultivated land as in the case of jungle land or land covered by water; that in suits brought as upon a dispossession by the defendant, if the plaintiff proves his title and *possession at any time* before suit, such possession is *presumed* to have continued until the dispossession by the defendant, so that the onus is thrown upon the defendant to prove when such dispossession first occurred.[1] In

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[1] This opinion is in accordance with that of the majority of the Judges in Poole *v.* Griffith, 15 Ir., C. L. R., 239, 279, but it is opposed to the Full Bench ruling in 12 Calc. L. R., 257, Hafiz *v.* Abdul Guny.

English authorities on the question of *onus.*

Messrs. Darby and Bosanquet, in their treatise on the Statutes of Limitation, make the following remarks on the subject of proving the commencement of wrongful possession: "In consequence of the statute not operating unless there is an actual wrongful possession, as well as discontinuance of possession by the rightful owner, a question of great practical importance arises in ejectment where the plaintiff proves title and possession under it, but not within the statutory period dating back from the commencement of the action; namely, whether the onus of proving *when the wrongful possession began* is on the plaintiff or defendant. As the general rule in ejectment is, that the plaintiff must recover by the strength of his own title, and not by the weakness of that of the defendant, and must prove not merely a right of property, but a possessory title unbarred by the Statute of Limitations (Taylor and Horde, 1 Burr., 60. 119; Nepean *v. Doe d.* Knight, 2 M. & W., 894; Cole on Ejectment, 6), it would seem on principle that the onus should be on the plaintiff, and this was the opinion of Pigot, C.B., in a case in the Exchequer Chamber in Ireland, and of two of the Judges in the same case in the Court below, but all the other Judges, seven in number, seem to have thought the onus lay on the defendant. (Poole *v.* Griffith, 15 Ir., C. L. R., 239; S. C. in error, *ibid*, 277.) The majority of the Judges seem, indeed, partly to have grounded their decision on the opinion, that the execution of a lease by one through whom the plaintiff claimed and continuous payment of rent under the lease afforded some presumptive evidence against the defendants, both that the lessee at the time the lease was granted was put into actual possession, and that he continued in such possession. The other three Judges dissented from this."—Darby and Bosanquet, pp. 221, 222.

Mr. Brown, in his work on the Law of Limitation as to real pro-

another part of the same judgment Sir Richard Garth says: "It is surely enough for the plaintiff to prove *primâ facie* his title in possession, and that the defendant has been in wrongful possession within twelve years before suit, leaving the defendant to prove, if he can, a statutory title by twelve years' adverse possession."

In a later case (*Hafiz Mahomed* v. *Abdool*, 12 C. L. R., 257), the learned Chief Justice restricts the application of the rule of *presumption* to cases where there is no direct evidence of possession, and where such evidence is, from the nature of the case, either difficult or impossible to obtain.

The opinions of Wilson and Field, JJ., on the question of *onus*.

In *Monmohun Ghosh* v. *Mathura Mohun Roy*,[2] Justices Wilson and Field considered the question of *onus* in cases of gradually diluviated and gradually reformed land both from the point of view of principle and from that of authority. Justice Wilson said: "Certain propositions of law upon the subject are undoubted. It is not disputed that, as a general rule,

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perty, p. 80, observes: "In Poole *v.* Griffith (15 Ir., C. L. R., 239) the Court said, that as chap. 27 (3rd and 4th Will. IV) bars not only the remedy but also the right, the claimant must show, within that time, not only a right, such as may exist on paper or parchment, but a title to the possession unbarred by the statute (Nepean *v. Doe d.* Knight, 2 M. & W., 894); and that when such a title is shown, the defendant, to displace it, must on his part show a title sufficient for that purpose, and cannot rest on simple possession. An adverse possession for twenty years would sustain such a title, but must be proved. But in the same case in error (15 Ir., C. L. R., 288), Pigot, C. B., said, he saw nothing in the second and third sections of the Statute, or in the authorities by which they have been expounded, to abridge the protection given to possession, or to shift from a plaintiff the burden of proving a possessory title unbarred by the Statute of Limitations; or in other words, to enable him to recover upon the weakness of the title of his adversary instead of upon the strength of his own."

[2] 8 C. L. R., 126.

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where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years—*Koowar Sing* v. *Nunda Lal Sing*, 8 Moo. I. A., 199, 200.

"Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case. In the case of a house actually occupied, or land under cultivation or yielding a rent, proof of possession is easy. In many cases, as of lands incapable of cultivation, jungle or waste lands, uninclosed plots of various kinds, all the proof that can commonly be given is to show possession taken, or acts of ownership done, at some time, which possession will in law continue until the possessor by his conduct shows that he means to relinquish his possession or he is excluded by some one else. These considerations, however, affect *the mode of proof*, not the *burden of proof*. The general rule still is, that the plaintiff must prove that he has been dispossessed within twelve years[3]—see *Pandurang* v. *Balkrishna*, 6 Bom. H. C. R., 125.

"But there are many cases in which the party on whom the burden of proof in the first instance lies may shift the burden to the other side by proving facts giving rise to a presumption in his favor.

"As to such cases (cases of lands gradually diluviated and gradually reformed) a second proposition is, I think, beyond question, that when the diluviation has been more than twelve years before

[3] See on this point, Sunnud Ali v. Kurrimoon-nissa, 9 W. R., 124.

suit, the claimant, unless he can show possession since the reformation, must at least show that he was in possession down to the date of the diluviation.[4]

"A third proposition is now, I think, beyond dispute, that where the true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged probably also afterwards until he is dispossessed. This proposition, however, would not be sufficient to shift the burden of proof. It would leave it upon the plaintiff, but would enable him to prove his case either by showing the dispossession to have been in fact within twelve years, or that the submergence has continued down to within twelve years; so that his possession cannot have been interfered with more than twelve years ago." Justice Wilson goes on to show that where plaintiff proves his possession down to the period of diluviation, the Court may further, if it thinks proper under the circumstances of the case, presume the submergence,[5] and with it the plaintiff's possession, to have continued until the contrary is shown. It is only when this presumption is made that the burden is shifted to the defendant, of proving adverse possession for twelve years, including the fact that the land has been reformed for more than twelve years. The learned Judge also points out that in the

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[4] The fact of an intermediate diluviation of the land cannot remove the bar of limitation, unless the plaintiff proves his possession before and at the time of the commencement of the diluviation—Gokool *v.* David, 23 W. R., 443.

[5] The well-known presumption in favor of the continuance of a physical condition, which in the ordinary course of things is likely to continue, is embodied in sec. 111, Illus. (*d*) of the Evidence Act.

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Justice Field in the same case observes that "although, according to general rule, it lies upon the plaintiff who is met with the plea of limitation to show his own possession within twelve years before the institution of the suit, when the property in dispute is capable of actual and visible possession, yet that, from the nature of the thing, an exception must be made to this general rule in the case of property which is not susceptible of actual and visible possession. In respect of this latter class of cases, it appears to be only reasonable to say that when the title and possession have been proved to be in a certain person up to a certain point of time,[7] when there has been no transfer of the title to any third person, and there is no evidence that possession was exercised by a person other than the person having the title, so long as actual and visible possession was possible, the possession of the person having the title will be *presumed* to continue until the property has again become susceptible of actual visible possession. A presumption dispenses with or supplies the place of evidence. If the above be a reasonable presumption, it takes the place of evidence to show the plaintiff's possession within

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[6] But where alluvial land is claimed as an accretion to a riparian estate, the presumption referred to in Sunnud Ali *v.* Musst. Kurrimoon-nissa, 9 W. R., 124, may arise.

[7] Justice Field does not say that it is necessary for the plaintiff to prove (by direct evidence) that he was in possession down to the date of the diluviation.

twelve years before suit in a property in which, from the nature of the thing, evidence of actual possession is impossible."

Wrongful possession of land, under a claim of right, before diluvion.

The possession of land under a claim of right, by a person having really *no title* to it, will also be *presumed* to continue when the land diluviates and is covered with water. The diluviation does not put an end to his wrongful possession, and restore the true owner to possession during the time that the submersion continues.[8] Time begins to run against the true owner when the wrong-doer first takes possession of the land, and it continues to run, irrespective of whether the land is or is not capable of occupation by reason of its submersion. The possession of a wrong-doer who might have held the land for only a year before it was washed away might thus ripen, as it were, under the water into a title, if the true owner neglected to bring his suit for ejectment for twelve years from the actual date of the wrongful possession of such land. To preserve his right, the owner should bring his suit within the limited period, whether at the time of suit the land is capable of occupation, or is lying under water in consequence of a diluviation.[9]

The Calcutta F. B. ruling on the question of *onus*.

The question of the burden of proof was recently considered by a Full Bench of the Calcutta High Court, and the following propositions have been laid down by the majority of the Judges :[10]

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[8] *Per* Garth, C. J., Kalichurn *v.* The Secretary of State, 8 C. L. R., 90, 98.

[9] *Per* White, J., *ibid*, 102, 103.

[10] Hafiz Mahomed *v.* Abdul Gunny, 12 C. L. R., 257 (F.B.) The rules laid down here are substantially the same as those enunciated by Justice Wilson in 8 C. L. R., 126.

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The ordinary rule is, that, under Act XIV of 1859, the cause of action, and under the present law, the event from which limitation is declared to run, must have occurred within the prescribed period, and that it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is *dispossession*, the plaintiff is bound to prove possession and dispossession within twelve years.

As a general rule, the plaintiff cannot, merely by proving possession, at *any* period *prior* to twelve years before suit, shift the *onus* to the defendant.

Where the land is incapable of actual enjoyment in any of the usual modes.

But possession is not necessarily the same thing as actual user or enjoyment. Where the land is incapable of any beneficial use, or where it yields some trifling profit, only now and then,—where it is permanently or temporarily incapable of actual enjoyment in any of the usual modes as by residence, tillage or receipts of a settled rent, it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is, that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this, his possession is *presumed* to continue as long as the state of the land remains unchanged, *unless he is shown to have been dispossessed.* Where lands are, by natural causes (such as diluvion), placed wholly out of the reach of their owner, if the plaintiff shows his possession down to the time when they were so placed out of his reach, his possession is presumed to continue as long as the lands continue to be in that condition.

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*Onus* as to the date of a change in the condition of such land.

The true rule as to the burden of proof of the date of a *change* in the condition of such land (*e.g.*, the date of jungle land being reclaimed, or of diluviated land being reformed and rendered capable of beneficial use) is this :—That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances, that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be *presumed* that it did so continue, and that the plaintiff's possession continued also, *until the contrary is shown.*[1]

Possession within 12 years need not be proved in suits under art. 144, Act XV.

But in suits for possession of immoveable property or any interest therein, for which there is no specific provision in Acts IX and XV,—that is, suits falling under art. 145 of Act IX, and art. 144 of Act XV,—it is not necessary for the plaintiff to prove that he was in possession within the period of twelve years. Even when the plaintiff was not in possession within the twelve years, he would be in time if the possession of the defendant or of some one through whom he claims was not adverse to the plaintiff. If the property was in the actual possession of a stake-

[1] Hafiz *v.* Abdool, 12 C. L. R., 257 (F. B.) This presumption holds good even if the land is cultivated at the date of suit. *So far* the Full Bench has overruled the case reported in I. L. R., 5 Calc., 36, Mohammed *v.* Morrison. The case of Mohini Mohun Dass *v.* Kristo Kishore Dutt, 12 C. L. R., 337, shows, that when submerged land rises above the water, the presumption of possession may be made, if it is in such a state that it is difficult to prove any positive acts of ownership over it. This case (as well as the Full Bench case) shows that, for the application of the rule, it is not necessary that land should continue to be waste at the time of the suit.

*N. B.*—I may here mention that as these Lectures were not published till sometime after their delivery, I have freely referred to some of the later decisions.

LECTURE V.

holder, and he delivered it to the defendant within twelve years, the plaintiff, although out of actual possession for more than twelve years, is not barred by the articles mentioned above.[2] So if the property was in the actual possession of the defendant's predecessor in interest under an arrangement with the plaintiff, and the arrangement was not finally put an end to until within twelve years of suit, the plaintiff is not barred by the said articles, even where the defendant is not bound by the arrangement.[3]

Proof of determination of particular estates.

In suits by remaindermen or reversioners, the date of the death of the life-tenant, or other determination of the particular estate, must be proved by the plaintiffs, in order that they may show that they have commenced their suits within the prescribed period from the time when the estate falls into possession.[4]

Of possession having

When the plaintiff wants to show that the defend-

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[2] Karan Sing *v.* Bakar Ali, I. L. R., 5 All., 1, P. C. It might have been otherwise under Act XIV of 1859, sec. 1, cl. 12, which required the suit to be brought within twelve years of the cause of action.

[3] Dewan Manwar Ali *v.* Unnoda Persad. I. L. R., 5 Calc., 644. In this case the plaintiff sued, in September 1873, to establish his right to a share in the disputed property. The property had been in the exclusive possession of plaintiff's brother for more than twelve years under a family arrangement or partition. In a previous suit brought against the plaintiff and his brother by the defendant, who had purchased, in execution, the rights and interests of plaintiff's brother, the partition was not proved against the defendant, and on appeal by plaintiff's brother, the partition was finally set aside in June 1863. Defendant took constructive possession of his purchased share in the whole estate in July 1864. It was held, that the possession of the property previous to June 1863 (if not to July 1864) was not adverse to the plaintiff, and that the mere fact of plaintiff's not appealing with his brother did not affect the question.

[4] See Lord Denman's judgment in 2 Smith's Leading Cases, p. 585, Nepean *v. Doe*; see also art. 140, Act XV of 1877.

ant's possession was not adverse but permissive, he must prove the character of the possession.[5]

been permissive.

When the plaintiff asks the Court to extend the period of limitation on the ground of defendant's fraud, his own minority, &c., &c, he must prove the ground of exemption from the ordinary rule.[6]

Of disability and fraud.

In a suit to enforce the right of pre-emption, the plaintiff must give *primâ facie* evidence that the defendant took possession of his purchase within the period of limitation.[7] It will be then for the defendant to prove that he has been in possession for more than the period of limitation.

When *onus* is shifted in pre-emption suits.

Where the law makes a special provision in favor of certain persons, those persons, even when they are defendants, must prove that they are the persons intended to be specially protected. Thus a defendant claiming the benefit of sec. 5, Act XIV of 1859 (corresponding with arts. 133 and 134 of Acts IX of 1871 and XV of 1877) must prove that he is a purchaser for valuable consideration from a trustee or mortgagee, unless indeed where the plaintiff admits the character of the purchase.[8]

*Onus* under arts. 133 & 134 of Act XV.

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[5] 5 W. R., P. C., 26, Meer Usod-oollah *v.* Beeby Imaman ; 10 Moore's I. A., 151, Sewaji *v.* Chinna. But in the case of co-sharers it may be otherwise, see Shurfunnissa *v.* Kylas, 25 W. R., 53 ; Sheikh Asud *v.* Sheikh Akber, 1 C. L. R., 364. The onus in this case may be shifted to the defendant.

[6] See sec. 14, Reg. III of 1793 ; Reg. II of 1805 ; Maharajah Rajendro Kishore *v.* Rajah Saheb Pershad, 22 W. R., 165, P. C. ; see secs. 102 and 103 of Act I of 1872 ; Joy Tara *v.* Roy Chunder, 1 W. R., 137 ; W. R., Sp., 304, 366 (minority) ; Sheikh Imdad *v.* Musst. Kootby, 6 W. R., P. C., 24 (defendant's fraud).

[7] See 8 W. R., 383, Ajmut Ali *v.* Kurar Ali ; and compare W. R. Gap No., p. 117, Lallum *v.* Hossemen. Act XV of 1877 makes a slight alteration as to the starting point in some cases of pre-emption.

[8] 15 W. R., P. C., 24, Radhanath *v.* Gisborne ; 23 W. R., 99, P. C., Juggernath *v.* Syed Shah Mahomed.

LECTURE V.

Proof of exceptional circumstances.

When the plaintiff relies on extinctive *prescription* (under sec. 34, c. 27, 3 and 4 William IV, or sec. 28, Act IX of 1871, or sec. 29 of Act XV of 1877) he must prove that he has been in possession for the prescribed period; but if the defendant contend that his right is saved by reason of the plaintiff's fraud or by some other exceptional circumstance, it is for the *defendant* to prove the fraud or the other circumstance on which he relies.[9] If the position of the parties be reversed and the party out of possession be the plaintiff, he shall, of course, have to prove that his suit is not barred by *limitation*, by reason of the exceptional circumstance on which he relies.

Under the wording of the proviso in art. 130, sched. ii, Act IX of 1871, corresponding with the proviso in cl. 14, sec. 1, Act XIV of 1859, if a suit for resumption was brought within twelve years from the time when the plaintiff's right to sue accrued, it was for the *defendant* to prove his rent-free possession from the time of the permanent settlement.[10]

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[9] See the judgment of Fry, J., in Rains *v.* Buxton. 14 Ch. Div., 537, 540. In this case the plaintiff sued for an injunction in respect of a cellar of which he was in *possession*: see p. 142; *infra*. The same rule will hold good if the plaintiff sues to *recover* possession on a *prescriptive* title.

[10] 3 W. R., 69, Mr. Forbes *v.* Sheikh Meah Jan; *ibid.*, 182, Sham Lall *v.* Sekunder; 5 W. R., 19, Nobo Lal *v.* Maharanee Narain Koowaree. This *proviso* has been omitted in Act XV of 1877.

In ejectment suits, where the plaintiff proves that he has been illegally dispossessed by the defendant, the *latter* should be called upon to prove his own title. If he fails to do it, the plaintiff is entitled to a decree; if, on the other hand, he succeeds, the plaintiff should then, and *not till then*, be called upon to prove a better title. 7 W. R., 174, as explained in 8 W. R., p. 389.

# LECTURE VI.

## POSSESSION, ADVERSE POSSESSION, &c.

The physical and mental elements in the notion of 'possession' — Possession how retained — Possession how lost — Trespass distinguished from possession — Symbolical or constructive possession — Possession through representative — The *detention* of a representative distinguished from the *possession* of a mortgagee or a tenant — The possession of zemindars and ryots, mortgagors and mortgagees — Land how possessed — Possession of part is possession of the whole — Possession of taluks and offices — Dispossession and discontinuance of possession — Adverse possession as defined by Mr. Angell — As defined by Mr. Markby — As defined by Sir J. Colvile — Knavish possession — Possession *primâ facie* adverse — Possession of derivative holders *protanto* adverse — Possession by a *third* party's tenant is wholly adverse to the owner — Tenant's encroachments — Change of permissive into adverse possession — Non-payment of rent by tenant — Repudiation by tenant — Possession by tenant's grantee — Trespasser's possession of demised premises — Prosunnó Moyi Dasi *v.* Kalidas Roy discussed — Possession by trustee's grantee — Repudiation by trustee — Possession of the trust-estate by a trespasser — Possession by mortgagor's or mortgagee's grantee — Repudiation by mortgagor or mortgagee — Case of a co-mortgagor redeeming the mortgage — Adverse possession of right to redeem and right to foreclose — Adverse possession against both mortgagor and mortgagee — Possession of a trespasser on mortgaged premises — Possession of a *bonâ fide* purchaser in cases of concealed fraud — Possession of Hindu widows and their grantees — Repudiation of reversioner's title — Possession of a trespasser on the widow's estate — Possession of members of joint family — Possession of co-sharers — Possession how far evidence of title — The interest of disseizors transmissible — Successive trespassers under art. 144, Act XV — Effect of attachments — Reinstatement after temporary dispossession.

In suits concerning specific property, specially immoveable property, the plea of limitation is very often dependent on questions relating to the possession of the property at and before the date of the

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suit.[1] It is therefore necessary to consider what possession means and signifies.

The physical and mental elements in the notion of 'possession.'

Mr. Markby, in his Elements of Law,[2] following the great Jurist Savigny, observes that there are two elements in the legal conception of possession, a physical element, and a mental element. In order to constitute possession in a legal sense, there must exist not only the *physical power*[3] (or rather the possibility) to deal with the thing as we like, and to exclude others, but also the *determination* to exercise that physical power or control on our own behalf.

Possession how retained.

When possession has been once received, it is not necessary that the physical power should be retained at every moment of time; the possession will continue if we can re-produce that physical power at any moment we wish it; and it will cease when we cannot do so.[4] It is also not necessary that the

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[1] The terms 'possession,' 'physical possession,' 'dispossession,' and 'adverse possession' occur in the third column of Sched. II of Act XV of 1877, which fixes the time from which limitation begins to run.

[2] See Markby's Elements of Law, Chapter VIII.

[3] The physical element is not necessarily connected with any bodily contact with the whole or any part of the subject, but it implies the physical power of dealing with the subject immediately, and of excluding any foreign agency over it. See Perry's Savigny on Possession, 73, cited in Collett on Torts, para. 162.

A zemindar, or an intermediate tenure-holder who receives rents from permanent tenants occupying the entire land, may have no physical power to deal with any part of the *land* in any way he likes, but he has power to deal with his zemindari or tenure in any manner he likes. Where the subject of possession is incorporeal, the possession is called '*quasi* possession,' as opposed to 'possession' *properly* so called. *Quasi* possession is the *exercise* of a right *in rem*. (Brown, 71.)

In suits for the recovery of (*possession* of) a wife (art. 34, Act XV of 1877), the wife, considered as the subject or object of rights, is a 'thing.'

[4] It is not necessary, in order to prove possession, to prove an actual bodily continuous possession.—*Per* Sir Barnes Peacock, quoting Domat in Watson *v.* Government, 3 W. R., 73, 80.

determination or intention to possess should be constantly present to our minds; it will be sufficient for the purpose of retaining possession, that we should, if we adverted to it, keep to that determination. According to this notion of possession, it follows that when either of the two elements is wanting, there is no possession.

Possession how lost.

When we have lost the *physical control* over the thing, we have lost possession,[5] whether we know it or not.[6] But as one of the legal consequences of possession is the right to use force in defending possession, a trespasser cannot, by the very act of trespass immediately and *without acquiescence* on the part of the owner, become *possessed* of the land or house upon which he has trespassed. If, however, he determines to hold the property on his own behalf, and is allowed to continue on the land or house, and the owner makes no effort to remove him, he gains possession,[7] the law no longer allowing the owner

Trespass distinguished from possession.

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[5] But land, of which A is in possession at the time of its diluvion, continues to be in A's possession, although it is wholly *out of his reach* until it is reformed on the same site. (Hafiz *v.* Abdool, 12 C. L. R., 257, 267, and Kalichurn *v.* The Secretary of State, 8 C. L. R., 90, 102.) This is an instance of *constructive* possession. It is *possession*, because under the circumstances it is *deemed* to be such in law.

[6] Actual knowledge of the fact is not necessary. See Rains *v.* Buxton, 14 Ch. Div., 537. Knowledge may be *presumed* from an open and notorious act of taking possession. See Angell, § 392.

[7] A trespass by a party struggling for possession must be acquiesced in by the party in possession before the former can be said to be 'in possession,' and the latter to be 'out of possession.' *In re* Mohesh Chandra Khan, I. L. R., 4 Calc., 417. See the remarks of Sir Barnes Peacock in 3 R. C. C. S. C., 5, quoted by Mr. Mayne under sec. 441 of his Indian Penal Code. As to acquiescence see Angell, § 398. A casual act of trespass would not have the effect of disturbing possession. (*Per* Garth, C. J., in Kalichurn *v.* The Secretary of State, 8 C. L. R., 98.) The mere physi-

LECTURE VI. — to (reproduce his physical control, and) eject the trespasser by force.

When our *intention* or *determination* to possess is expressly abandoned or presumed to have been abandoned, our possession is equally lost. Whether the thing so abandoned is *possessed* by *another* person or not, depends on the existence or otherwise of both the physical control and the intention to possess in that other person. But where positive law, in cases of certain transfers, prescribes a particular form or mode of delivering possession (as in sec. 29, Act XI of 1859; secs. 224, 264 of Act VIII of 1859; secs. 264, 319 of Act X of 1877, and of Act XIV of 1882), such formal delivery, as between the parties concerned, must be *deemed* equivalent to actual possession, even when the former possessor retains his control over the property.[8] Such possession is sometimes described as "symbolical possession."

Symbolical or constructive possession.

Possession through representative.

The possession of a thing through our servant, bailiff, or other representative is our possession, not fictitiously or constructively but really and directly; for we may at any moment, supposing the represent-

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cal occupation of land by a trespasser is not juridical possession.—Dadabhoi *v.* The Sub-Collector, 7 Bomb., 82.

[8] Notwithstanding the continuance of both the physical and mental elements, the former possessor loses his possession, and the purchaser or the decree-holder obtains possession. This, however, is *constructive* possession. It is possession because the *law* looks upon it as such. See Juggobandhu *v.* Ram Chandra, I. L. R., 5 Calc., 584; (S. C.) 5 C. L. R., 548, F. B.; Mozuffer *v.* Abdool, 6 C. L. R., 539; and Gunga Govind Mundul *v.* Bhoopal Chunder, 19 W. R., 101, P. C.

If the former possessor continues to hold actual possession, the purchaser or the decree-holder will have a fresh start from the date of formal delivery of possession. *Strangers*, however, are not affected by such formal delivery. (Doyanidhi *v.* Kalai Panda, 11 C. L. R., 395.)

ative is obedient to our commands, resume our physical control over the thing. The so-called possession of the representative is 'detention' not 'possession,' in a legal or juridical sense.

The conditions necessary to constitute possession through a representative are, (*a*) that the representative must have the physical control over the thing; (*b*) that the representative must determine that this physical control shall be exercised on behalf of the principal; and (*c*) that the principal must assent to its being so exercised. If the representative changes his mind and determines to hold the property on behalf of himself, strictly speaking, the possession of the principal is gone. But here the law interferes in favor of the principal, and holds that his possession continues, at least, until the denial of his right is brought to his knowledge.

The apparent possession of the guardian of an infant, and the committee of a lunatic, is legally the possession of the infant and the lunatic; the authority (*auctoritas*) of the representative in these cases supplies the mental deficiency of the infant and the lunatic.

The *detention* of a representative distinguished from the *possession* of a mortgagee or a tenant.

The bare *detention* of a representative on behalf of the principal should, however, be distinguished from the *possession* of a mortgagee, a pawnee, and a tenant. The possession by these persons of the property of another, although *derivative*, is, strictly speaking, their own possession, though generally, as against *third* persons, the possession of the derivative holder may be *deemed* to be the possession of the original owner.[9]

[9] This is constructive possession on the part of the owner. As regards the possession of tenants, see Busby *v.* Dixon, 3 B. & C., 298, cited in Collett on Torts, sec. 164.

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The proprietor is also *actually* in possession (that is, in *quasi* possession) of the *interest* which he still has in the property.[10] The derivative holder, as such, does not intend to hold the property as *absolute* owner or proprietor.

The possession of zemindars and ryots, mortgagors and mortgagees.

The zemindar, intermediate tenants and occupying ryots are all, in their degree, respectively in possession of the interests which they severally enjoy;[1] and so long as the original relation between the lessor and the person immediately holding from him subsists, the (actual) possession of the latter is also, for many purposes, the (constructive) possession of the former.[2] Where a cultivator of the soil gets a share

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If the mortgagee or lessee is *dispossessed* by a third person, the question, whether the *owner* also is constructively dispossessed, is more difficult. There are conflicting rulings on the point: see Ammu *v.* Ram Krishna, I. L. R., 2 Mad., 226, and Vithoba *v.* Gungaram, 12 Bomb., 180; Prosonnomoyi *v.* Kalidas, 9 C. L. R., 347, and Krishna *v.* Hore, 12 C. L. R., 19. It may be remarked that constructive possession is (generally speaking) an incident of *ownership*, that what applies to possession does not necessarily apply to dispossession, and that although the possession of a leaseholder may be deemed to be the possession of the lessor, the dispossession of a leaseholder may not, for purposes of limitation, be *deemed* to be the dispossession of the lessor.

The word 'possession' in sec. 318 of the Criminal Procedure Code, Act XXV of 1861 (corresponding with sec. 530 of Act X of 1872 and sec. 145 of Act X of 1882) has been interpreted to include possession *by or through* an immediate tenant or an usufructuary.—Sutherland *v.* Crowdy, 18 W. R., 11, 13, Cr. Rul.

[10] Jogeshwar *v.* Jawahir, I. L. R., 1 All., 311.

[1] See the remarks of Justice Jackson in Harak Narain Singh *v.* Luchmi Bux Roy, 3 Shome's Law Reporter, Vol. III, Cr., 8, 9. According to English law, the grantee of land for a term of years, however long, has no *estate* in the land, and can therefore have no *possession* of the land.—Markby's Elements of Law, sec. 356.

[2] But if the interest of the tenant is heritable, transferable, and perpetual, if the owner of the estate reserves no rights except that of receiving a rent, the possession of the tenant is not (even according to the principles of English law) the possession of his landlord, but possession on his own behalf—Bejoy *v.* Kally, I. L. R., 4 Calc., 327, 328. As against

of the crops in lieu of wages, or where his tenure is in the nature of a partnership in which the landlord participates in the crops with him, the landlord may be said to be in possession of the soil;[3] but where the tenant has an interest *in rem* in the land which enables him to exclude others, including the zemindar or talukdar, from the land, he (and not the zemindar or talukdar) is in possession of the soil.[4] Nevertheless the zemindar or talukdar may be in possession of his *zemindari* or *taluki* interest by receipt of rent from the tenants and ryots. So again, the mortgagor, or the purchaser of his equity of redemption (or right to redeem), may be in possession of his interest, although the land itself is in the possession of the mortgagee.[5] But such rights and interests being incorporeal, are, strictly speaking, incapable of corporeal or physical possession.

So long as the relation of landlord and tenant, or mortgagor and mortgagee, continues, the owner is in possession of his interest in the land, and the tenant or mortgagee's possession of the land is subject to the rights of the owner. The derivative holder claims one sort of possession, and the owner a different sort of possession,[6] or using the word 'thing' as includ-

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third persons, however, for purposes of limitation, the owner is deemed to be in possession of the estate by his tenant.

[3] See Venkatachalam *v.* Andiappa, I. L. R., 2 Mad., 232.

[4] See Thakoee Sarap *v.* Smoult, Fulton's Reports, Vol. I, p. 136, where it was held by Sir L. Peel, that a talukdar cannot bring trespass in respect of land in the occupation of his ryots.

[5] Jageshwar Sing *v.* Jwahir Sing, I. L. R., 1 All., 311, F. B.

[6] See Umr-un-nissa *v.* Mahammed Yarkhan, I. L. R., 3 All., 241, F. B. The *same* sort of possession (full, proprietary, or otherwise) must be claimed by the contending parties before the possession of one becomes adverse to the other.

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ing a right, the derivative holder claims possession of one thing, and the owner claims possession of another thing.

Land how possessed.

For purposes of limitation and prescription 'land' may, generally speaking, be said to have been possessed and occupied[7]—

(*a.*) Where it has been usually cultivated or improved;

(*b.*) Where it has been protected by a substantial enclosure;

(*c.*) Where buildings have been erected upon it;

(*d.*) Where it has been used for the supply of fuel, timber, minerals, wax, honey, lac, juice of trees, and the like, or for the purposes of husbandry, or otherwise for the benefit of the occupants.

Such other acts of ownership exercised over land, as are natural under the existing condition of the land, are evidence of possession of the land, if it is not susceptible of a more strict or definite possession.[8] Thus in the case of a *baor* or water channel lying between two estates, rights of fishing exercised in and over the water, or working minerals below the surface of the soil, would be *primâ facie* evidence of possession and ownership, unless it could be shown that such acts were referrable to a right of easement or some other right or title.[9]

Possession of part is possession of the whole.

Where lands which are not capable of actual occupation or enjoyment in the usual modes (such as a

[7] Sec. 23 of Sir J. F. J. Stephen's Limitation Bill, No. 3 of 1870. *Cf.* New York Revised Statutes, Vol. II, Part 3, Chap. 4, Tit. 2, secs. 10—12.

[8] See Hafiz *v.* Abdul, 12 C. L. R., 260, *ante*, p. 126; and Angell, § 398.

[9] Mohini Mohun Dass *v.* Kristo Kishore Dutt, 12 C. L. R., 337, 339.

newly-formed accretion, or a khal) appertain to lands which are so occupied or enjoyed, the possession of the former follows that of the latter, unless and until another person takes adverse possession of the former.[10]

Generally speaking, possession of part is, in law, possession of the whole, if the whole is otherwise vacant. This constructive possession results from title. In the case of *wrongful* possession of a part by a stranger, his possession does not extend to the whole, unless it is accompanied by a definite claim of title to the whole. It has been held in America that the doctrine of constructive adverse possession does not apply to very large tracts of lands. (See Angell, §§ 394, 395, 401 (note), 402, & 403.)

Possession of taluks and offices.

A taluk or an intermediate tenure is said to have been possessed when the rents payable by the under-tenants have been usually received. Lands and houses in the possession of tenants are (as regards third persons) deemed to be in the possession of the landlord.

An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.[1]

Before Act IX of 1871 came into operation, in claims to the possession of land, the accruing of the cause of action was the point from which limitation, generally, commenced to run, and to ascertain when the cause of action arose, it was often neces-

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[10] See Sunnud Ali *v.* Musst. Karimun-nissa, 9 W. R., 124; Hafiz *v.* Abdul, 12 C. L. R., 257, 266.

[1] Schedule II, art. 124, Act XV of 1877, and art. 123, Act IX of 1871.

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sary to consider when the defendant's possession became adverse to the plaintiff. Now, the law has to a large extent definitely fixed the point from which the period of limitation is to run.[2]

The term 'adverse possession,' however, occurred in arts. 123 and 145 of Act IX of 1871, and still occurs in arts. 124 and 144 of Act XV of 1877. And the words 'dispossession' and 'discontinuance of possession' which are used in some other articles, do not include cases where the defendant's possession is 'permissive' and on behalf of the plaintiff.[3]

Dispossession and discontinuance of possession.

The words 'dispossession' and 'discontinuance of possession' (in art. 143, Act IX of 1871, and art. 142 of Act XV of 1877) are borrowed from sec. 3 of the 3rd and 4th Will. IV, c. 27.[4] In a recent English case[5] Fry, J., said: "In my view the difference between dispossession and the discontinuance of possession might be expressed in this way,—The one is where a person comes in and drives out the others from possession, the other case is when the person in possession goes out and is followed into possession by others." It was held in that case that where *A* was in constructive possession of a cellar under his ground, and *B* subsequently took actual possession of it, *A* must be deemed to have beeen dispossessed or to have discontinued the possession, though he was ignorant of the existence of the

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[2] Govinda Lal Seal *v.* Debendra Nath Mallik, I. L. R., 5 Calc., 679; (S. C.) 5 C. L. R., 527, 531.

See Govinda Lal Seal *v.* Debendra Nath Mallik (on appeal), I. L. R., 6 Calc., 311; (S. C.) 7 C. L. R., 181.

[4] I. L. R., 6 Calc., 311; (S. C.) 7 C. L. R., 181.

[5] Rains *v.* Buxton, 14 Ch. Div., 537.

cellar or of its adverse occupation by *B*. An *actual* driving out of possession, or an *actual* going out of possession, is not necessary where another person takes actual possession of the property.

In *Kali Charan Sahu* v. *The Secretary of State*,[6] Justice White held that *dispossession* occurs where the property is taken actual possession of, or is capable of being taken such possession of by another, and does not apply to the case where the property is submerged by the act of God, and so made impossible of occupation and actual possession. Possession under a claim of right, whether wrongful or not, if existing at the date of diluvion, continues so long as the property is under water.[7] Mere abandonment of possession does not amount to *discontinuance* within the meaning of the Act, unless it is followed by the possession of *another* person in whose favor time would run.[8] The term is not applicable where the possession of this other person is only permissive and not adverse to the owner.[9] A person is not dispossessed unless ejectment will lie at his suit against another person.[10]

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[6] 8 C. L. R., 90, 101; (S. C.) I. L. R., 6 Calc., 725.

[7] See 8 C. L. R., 90, 98. A mere trespass *without* a claim of right does not amount to an *ouster* of the party rightfully in possession. But it is not necessary that the claim should be believed to be a *just* claim. A dishonest or *knavish* possession does not prevent the possessor from availing himself of the provisions of the Limitation Acts, provided the case does not fall under the exception as to "concealed fraud." See Angell, § 389, note; Kowar Poresh *v.* Watson & Co., 5 W. R., 283; and sec. 18, Act XV of 1877.

[8] Lord St. Leonard's Handy Book of Property Law, p. 214; Banning, 98; Kalichurn *v.* The Secretary of State, I. L. R., 6 Calc., 725, *per* White, J.; Pandurang *v.* Balkrishna, 6 Bomb., 125. See also I. L. R., 9 Calc., 698, 702.

[9] Govinda *v.* Debendra, 7 C. L. R., 181.

[10] Darby and Bosanquet, p. 218.

LECTURE VI.

Adverse possession as defined by Mr. Angell.

An *adverse* holding, according to Mr. Angell, is an actual and exclusive appropriation of land commenced and continued *under a claim of right*, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him who was in possession.[1] It is the *intention* to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a cause of action, which constitutes adverse possession.[2] A mere squatter who does not set up *any* claim of right cannot plead adverse possession.[3] But a person who obtains possession even by *dishonestly* setting up an unjust title, is protected by the Indian Limitation Acts.[4]

Speaking of the present English law of limitation, Mr. Markby observes, that the statute assumes that there has been a complete dispossession by a person who does not acknowledge the other's right, but denies them; and not only denies them, but interferes with them in such a way as to amount to a breach of

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[1] See Angell, § 390 and note (7), p. 143, *supra*.

[2] *Ibid.*

[3] See the judgment of Norman, J., in Watson *v.* Government (3 W. R., 73, 81) and the remarks of Steer and Levinge, JJ., in Nytyanund Ghosh *v.* Kissen Kishore (Gap No. W. R (Act X), 82); Mussamut Lall Bibee *v.* Kalinath, 2 Hay, 487; Vane *v.* Vane, 2 L. R., 8 Ch. Div., 397, cited in Shephard on Limitation, p. 62.

[4] Under the Civil Law (as well as under *certain* provisions of Beng. Reg. II of 1805, and Bomb. Reg. V of 1827) it was necessary that the possessor must have been persuaded that he had a just cause of possession, and must have been ignorant that what he possessed did belong to another person. This rule of the Civil Law did not hold good when there was an *express* law of limitation applicable to the case. See Kowar Poresh *v.* Watson & Co., 5 W. R., 283.

the law for which an action would lie[5] And in *Bijoy Chundra Banerji* v. *Kally Prosannah Mukherji*[6] (a case governed by Act IX of 1871), Mr. Justice Markby says :—" By *adverse* possession, I understand to be meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession.[7]"

LECTURE VI.

As defined by Mr. Markby.

'Adverse possession' is a *relative* term. Possession adverse to *A* may not be adverse to *B*, and possession, which is now permissive, may become adverse on the occurrence of a future event. The following general rule, showing when possession becomes adverse, and to what persons, was considered sufficiently comprehensive by Sir James Colvile, Sir Arthur Buller, and other members of the Select Committee on the Limitation Bill of 1855—1859 :—" The possession of any property by any person shall be deemed adverse to every other person, having or claiming to have a right to the possession of such property by virtue of a *different* title. If the person claiming such right, or any person under whom he claims, has been actually dispossessed, the period of adverse possession shall be calculated from the date of such dispossession. In all other cases, it shall be calculated from the time at which the person claiming such right or some person under whom he claims might first have asserted his right to the possession of

As defined by Sir J. Colvile.

[5] Markby's Elements of Law, Chap. X. para. 396.

[6] I. L. R., 4 Calc., 327, 329 ; (S.C.) 2 Shome's Rep., 106, 107.

[7] See also the judgment of Markby, J., in Kheerodamoney *v.* Doorgamoney, I. L. R., 4 Calc., 455 ; (S.C.) 3 C. L. R., 315, 326.

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the property."[8] In so far as positive enactments[9] do not interfere with this rule, it may be accepted as a safe and sound one.

The extent of the adverseness of possession depends on the extent of the claim of right under which possession is obtained and kept. Where such claim is restricted to a limited interest in the property, the possession is adverse to that extent only.

Knavish possession.

Since the repeal of Bengal Reg. II of 1805 and Bombay Reg. V of 1827, the law of limitation in India does not make any distinction between cases where the possession begins by conscious wrong, and cases where the possession commences in a cause believed to be just although it may be under a title which is really defective.[10] Dishonesty in obtaining possession (not amounting to fraud under sec. 18 of

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[8] Section 7 of the Amended Limitation Bill. When a tenant-for-life is dispossessed, the reversioner or remainderman, not having a right to *immediate* possession, cannot assert his right to the possession. The possession of the trespasser during the continuance of the life-estate is, therefore, not adverse to the reversioner or remainderman.

[9] Bombay Reg. V of 1827 expressly enacted that the party in possession must have held the (immoveable) property *as proprietor* in order that he might avail himself of the thirty years' or even the sixty years' limitation and prescription. (These words would seem to exclude the case of a person, who dispossessed the true owner, *as a tenant* of a third party. The language of the Regulation was, therefore, objectionable.) The doctrine of estoppel also may affect the *application* of the rule given in the text. Thus it has been held in England that a party in wrongful possession under an invalid will, which purports to give him a *limited* interest in the property, is estopped from setting up an adverse title, and an adverse possession, against a remainderman under the same will. Board *v.* Board, L. R., 9 Q. B., 48, cited in Banning on Limitation, p. 107; and Hawksbee *v.* Hawksbee, 11 Hare, 230, cited in Darby and Bosanquet's Statutes of Limitation, p. 394. See Lecture XI.

[10] It is the same under the English law; see Markby's Elements of Law, pp. 206 and 267.

Act XV of 1877, sec. 19 of Act IX of 1871, or sec. 9 of Act XIV of 1859) will not prevent the possessor from availing himself of the law of limitation.[1]

Possession *primâ facie* adverse.

Possession is *primâ facie* adverse and exclusive.[2] It is presumed to be of right, until such presumption is rebutted by evidence.[3]

Possession of derivative holders *protanto* adverse.

The possession of derivative holders, such as tenants and mortgagees, is not adverse to the owner, in *so far* as they do not claim to hold under a different title. A mourasidar or mirasdar holding a permanent tenure under the zemindar, holds under a title which is *protanto* adverse to that of the zemindar. A person claiming such a title to the knowledge of the zemindar may therefore successfully plead limitation, if the zemindar sues him as an ordinary tenant,

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[1] See Koowar Poresh Narain *v.* Watson, 5 W. R., 283, where Sir Barnes Peacock, C. J., quotes Domat's Civil Law, 2208, 2209, to show that, even according to the Civilians, the fact of obtaining possession dishonestly or knavishly will not prevent a man from availing himself of an *express* law of limitation.

[2] *Per* West, J., in Mohanlall *v.* Amratlal, I. L. R., 3 Bomb., 174, 177. For (apparent) exceptions to this rule, see pp. 130, 150, 151. A party is always presumed to possess for himself, unless it is proved that he commenced his possession for another. (Code Napoleon, article 2230.) But possession is never considered adverse if it may possibly be consisten with the lawful title.—Banning, p. 277. "While there subsists any contract, express or implied, between the parties in and out of possession to which the possession may be referred as legal and proper, it can not be pronounced adverse." *Per* West, J., in Dadoba *v.* Krishna, I. L. R., 7 Bomb., 34, 39.

[3] Code Napoleon, 2230. See also Bireswar *v.* Onooda, 3 W. R., 12, where the possession of a sister of a deceased Hindu proprietor of Bengal was *presumed* to be *adverse* to his legal heirs; and Rajah Pedda *v.* Arovaola, 2 Moo. I. A., 504; (S.C.) 6 W. R., P. C., 13, where the possession of a house within the zemindari by the zemindar's agent, was presumed to be of right, and the zemindar's suit for ejectment was dismissed on his failure to prove that the defendant held the house on his behalf.

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for ejectment.[4] For a similar reason, it is apprehended that a person claiming as a lessee for a definite term (say for 99 years) to the knowledge of the landlord may, after twelve years' occupation, be allowed to plead limitation in a suit for ejectment during such term.

It has been laid down generally, that the possession of a tenant for a term of years is not adverse to the landlord, who has in such a case a reversionary interest in the land.[5] But during the *currency* of the term, the tenant holds under a title which is *protanto* different from, and inconsistent with, the title which the landlord, sets up when he sues for *khas* possession, and the former's possession is *so far* adverse to the latter. The doctrine of the English law is that a grant of land for a term of years, however long, does not confer on the grantee any estate in the land, and that the grantee, taking no estate in the land, can only have *detention* of it, and not *possession* under the grant.[6] But the law of British India does recog-

[4] Shaik Nujomoddin *v.* Mr. Lloyd. 15 W. R., 232; Rajah Sahib Perhlad *v.* Doorgapersad, 12 W. R., P. C., 6, 14; Tekaetnee Goura *v.* Musst. Saroo, 19 W. R., 252, P. C.; Petamber Baboo *v.* Nilmoney Sing, I. L. R., 3 Calc., 793.

But a plaintiff who merely sues to establish his *proprietary right* as against a *mokrurreedar* is not bound to prove that he has been in *actual* possession of the land within twelve years before action brought, since if the defendant has held as *mokrurreedar*, under the plaintiff, the defendant's possession cannot be adverse to the plaintiff, and limitation can not be pleaded against him. See Protab Narain Mukherjee *v.* Kartic Chunder Mukherji, 10 W. R., 192.

[5] See Bijoy *v.* Kali Prasanna, I. L. R., 4 Calc., 327; (S. C.) 2 Shome's Rep., 106; and compare Messrs. Watson & Co. *v.* Rani Shurut Sundri, 7 W. R., 394; and Shaik Normoddeen *v.* Mr. Lloyd, 15 W. R., 232.

It has also been held that a person holding under *A's* tenant does not hold adversely to *A*.—Bungsrar *v.* Mohunt, 20 W. R., 398.

[6] Markby's Elements of Law, para. 356.

nize the interest of a lessee for a term as an interest in land. The lessee's possession of this interest is therefore his own possession; and during the continuance of the lease is *protanto* adverse to the landlord.

After the *determination* of a lease (say for twelve years), when the landlord becomes entitled to *khas* possession, the lessee cannot, of course, plead that his *former* possession was adverse to his lessor, and that the lessor's suit for khas possession is barred by limitation.

Possession by a *third* party's tenant is wholly adverse to the owner.

The doctrine that a tenant's possession is not legal possession, and that his possession is really the landlord's possession,[7] was carried to such an extent that it was held that a tenant of *A*, in possession of another's land as such tenant, can not plead limitation if *A* does not join him in raising the question.[8] But the correct doctrine appears to be that if the defendant denies the plaintiff's title and holds the land against the plaintiff, he may, although himself a tenant of another person, plead limitation against the plaintiff.[9]

Tenant's encroachments.

Where a tenant during his tenancy encroaches on the adjoining lands of *his landlord*, the presumption is that the lands so encroached upon are added to the

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[7] So long as nothing occurs to determine the tenancy, the possession of the lessee is the possession of the lessor.—Parbutti *v.* Ram Chand, 3 C. L. R., 576.

[8] Sristidhar *v.* Gopalchunder, 1 W. R., 172. See also Justice Trevor's judgment in 3 W. R., 73, 77; and Jardine Skinner *v.* Rance Shama, 3 W. R., 144.

[9] See the judgment of Loch and Pandit, JJ., concurred in by Peacock, in Watson *v.* Government, 3 W. R., 73, 75, 76 and 78. See also Junglu *v.* Bama Sunduri, 1 W. R., 202, and Thomson's Law of Limitation, 2nd Edition, . 159.

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tenure, and form part thereof, for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of the landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. The act of the tenant in taking possession of more land than was let to him, though it may possibly have been a trespass and wrongful, may, in most cases, equally well have been done with the assent, express or implied, of the landlord, and so have been rightful; and in the absence of any proof to the contrary, it is treated as the latter. When the landlord sues to assert his proprietary rights over the excess land, the possession of the tenant can not, *primâ facie*, be treated as adverse.[10]

Where *A's* tenant, during his tenancy, encroaches on the land of *B*, a neighbouring proprietor, and holds possession thereof for the prescribed period, as against the tenant, *A* is presumably entitled to the land so encroached upon. This presumption against the tenant may be rebutted by clear evidence that he intended the encroachment for his own benefit and not for the aggrandisement of his original holding. As against *B*, it is by no means clear that such a presumption will be made in favor of the landlord.[1] Where the tenant has taken possession of the land, *as a part of his holding under A*, the tenant, as well as

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[10] Gooroodass Roy *v.* Issurchander Bose, 22 W. R., 246; see also Andrew *v.* Francis, 2 Hay, 560; and Erskine *v.* The Government, 8 W. R., 232, 233; but cf. Indro *v.* Golluck, 12 W. R., 350.

[1] See Lord Campbell's judgment in *Doe v.* Mossey, 17 Q.B., 376, referred to by Justice Norman in 3 W. R., 73, 81.

*A*, may plead limitation against *B*, and shew that *B's* right has been extinguished.[2]

Change of permissive into adverse possession.

As possession is *primâ facie* adverse, it is for the party who contends that his opponent's possession is only *permissive* to prove that it is so. If the defendant has been in possession for more than twelve years, to remove the bar of limitation, the plaintiff must prove that such possession was not adverse, but in the character of an agent,[3] or of an usufructuary mortgagee,[4] or that it was otherwise permissive.[5] But where occupation was originally *permissive*, its conversion into an occupation of a wholly *adverse* nature is not to be presumed in the absence of affirmative evidence to establish the change.[6] A person who

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[2] Messrs. Darby and Bosanquet (at pp. 395, 396 of their work on Limitation) say :—"If a tenant during the continuance of his tenancy encroaches on land, and holds it as part of the demised premises for the period of limitation prescribed by the statute, his landlord will, at the end of the term generally, have the benefit of the encroachment." See also the cases referred to in note 9, p. 149.

[3] Meer Usseedoollah *v.* Beeby Imaman, 1 Moo. I. A., 19 ; (S. C.) 5 W. R., P. C., 23.

[4] 10 Moore's I. A., 151, Sewaji Vijoya *v.* Chinna Nayana.

[5] But many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land, would between joint owners naturally bear a different construction—Hafiz *v.* Abdool, F. B., 12 C. L. R., 257, 269. Thus if the subject of suit is a portion of joint family property, the possession of it by one coparcener may be referred to the continuing *consent* of his co-sharers, and may not therefore be adverse. See Sheo Pershad *v.* Lulah, 20 W. R., 160 ; and Yusuf Ali Khan *v.* Chubbee Singh, 5 N. W. P., 122.

[6] See Markby's Elements of Law, sec. 347 ; Waheeoodden *v.* Jhinguree, 2 N. W. P., 16 ; Brown, 77.

According to the Code Napoleon, art. 2231, "When a person has commenced his possession in right of others, he is always presumed to possess by the same title if there be no contrary proof."

When a person enters on possession and is left in possession in the first instance, in accordance with a contract, he cannot "change the character of that possession by his own mere will."—Dadoba *v.* Krishna, I. L. R., 7 Bomb., 34, 38.

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holds possession on behalf of another does not, by a mere denial of that other's title, make his possession adverse, so as to give himself the benefit of the statute of limitation.[7]

No act or default of a tenant, a trustee or a bailee can by itself change the character of the possession which he originally acquired. If such person repudiate the title of the owner, there must be such *acquiescence* on the part of the latter as would put an end to the original relation of the parties, before the former can be said to be in 'adverse possession.'[8]

Non-payment of rent by tenant.

The mere non-payment of rent for twelve years, by a person who is proved to have entered into possession as a tenant, does not convert the tenancy into adverse possession.[9] Even if the tenant during his tenancy pays the rent to a third person and attempts to substitute him in the place of his landlord, without openly renouncing or putting an end to the tenancy, the possession of the tenant shall still be looked upon as the possession of the landlord.[10]

Repudiation by tenant

The tenant's attornment to a third person will not affect the title of the lessor so long as the tenant does not directly repudiate the tenancy, and the land-

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[7] Bijoy Chander *v.* Kally Prasana, I. L. R., 4 Calc., 327; Madhub *v.* Sham, I. L. R., 3 Calc., 243.

This would be so, at least, until the denial of the principal's right, or some unequivocal act inconsistent with that right, had been brought to the *knowledge* of the principal.—Markby's Elements, sec. 347.

[8] Angell, §§ 444, 445.

[9] Prem Sukh *v.* Bhupla, I. L. R., 2 All., 517, F. B; Troylukho *v.* Mohima, 7 W. R., 400; Watson *v.* Government, F. B., 3 W. R., 73, 82; Rungolall *v.* Abdool, 3 C. L. R., 119; 5 Bom. A. C., 85; and I. L. R., 7 Bomb., 34. See Lecture XI.

[10] Parbutti Dosi *v.* Ramchand, 3 C. L. R., 576.

lord knowing this does not acquiesce in the act.[1] The tenancy must actually or constructively be determined before the possession of the tenant can become adverse to the landlord.[2] Eviction from the demised premises by the lessor, by those who claim under him, or by persons who have paramount right to him, may have the effect of determining the tenancy and relieving the tenant from the liability to pay rent. But an ouster by the acts of a trespasser without title has no such effect.[3]

The Transfer of Property Act (No. IV of 1882), sec. 111, expressly enacts that the tenant must renounce his character as such by setting up a title in a third person or by claiming title in himself, *and* the landlord or his transferee must do some act showing his intention to determine the tenancy. In cases governed by the Act, both these conditions must be fulfilled before the tenancy can be determined and converted into adverse possession.

Under art. 3479 of the Lousiana Code, and art. 2239 of the Code Napoleon, a purchase of the property from the tenant, the depositary or any other derivative holder, operates as the basis of an adverse possession in favor of the purchaser; but according to Lord Mansfield (in *Atkyns ex. dem.*

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[1] See Banning, 145, and Hovenden *v.* Lord Annesley, 2 Sch. and Lef., 624, cited in Shephard on Limitation, p. 65.

[2] 3 C. L. R., 576. In England before the enactment of 3 and 4 Will. IV, c. 27, sec. 9, payment of rent during the term of the lease to a wrong person did not, subject to the question of acquiescence, amount to an ouster.—Smith's Leading Cases, Vol. II, pp. 732, 741, 8th Edition; Banning, 145.

[3] Mrs. B. Donzelle *v.* Girdharee. 23 W. R., 121; Rung Lall *v.* Lalla, 17 W. R., 386; Gopanund *v.* Lalla, 12 W. R., 109; Khajah Abdool Gunny *v.* Poorno Chunder, 2 Hay, 524.

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Possession by tenant's grantee.

*Taylor* v. *Horde*) in the case of a purchase from the tenant, the landlord is not bound, but may *choose*, to consider himself as dispossessed by the purchaser.[4] The Indian Limitation Acts (sec. 5, Act XIV of 1859, and arts. 133 and 134 of sched. ii, Acts IX of 1871 and XV of 1877) expressly provide for the protection of purchasers from trustees, mortgagees, pawnees and depositaries, but omit to mention the case of purchasers from tenants. However, as the landlord, before he puts an end to the tenancy, is not entitled to immediate and direct possession of the property, it has been held (by Peacock, C. J., and Jackson, J.) that the possession of the grantee claiming under the tenant does not become adverse to the landlord, so as to oblige him to sue the grantee before the determination of the tenancy.[5]

If the landlord is apprized of the fact that the tenant disavows the tenure and sets up a title in himself or in a third person, the safer course is to determine the tenancy.[6] But the law nowhere *obliges* the lessor to put an end to the lease on the ground of forfeiture.[7]

Trespasser's possession of demised premises.

The majority of the Judges in *Poole* v. *Griffith*[8] were of opinion that where a stranger enters as a trespasser upon a part of the land held under a lease, and

[4] See also Angell, § 443.

[5] C. T. Davis *v.* Kazee Abdool, 8 W. R., 55, 58, 59.

[6] According to Lord Redesdale (in Hovenden *v.* Lord Annesley, 2 Sch. and Lef.. 624), if the lessee attorns to another, and the lessor neglects to proceed for the forfeiture, he has no right to affect the rights of third persons on the ground that the possession was betrayed; and there must be a limitation to that as to every other demand.—See Brown on Limitation, p. 313, and Shephard, p. 65.

[7] See sec. 111, Act IV of 1882, and Banning on Limitation, p. 147.

[8] See 15 Ir. C. L. R., 270, and Brown on Limitation, p. 487.

continues in possession for the prescribed period, the right of the lessor, on the expiration of the lease, would be unaffected although the right of the lessee would be barred. It has also been held in this country by Norman and Seton-Karr, JJ., on review, that during the continuance of a lease, the eviction of the lessee from the demised premises does not give the lessor any cause of action against the trespasser, if the lessor is not deprived of his rent, or rent is not received adversely to him by a stranger.[9] There are also several dicta of Sir Barnes Peacock, C.J., and other Judges to the effect that a landlord cannot maintain an action of ejectment, either against a tenant or against a trespasser, before the tenancy is determined.[10] Sir James Colvile in his Prescription and Limitation Bill provided for the protection of landlords against such trespasses. This provision,[1] however, along with all the provisions

[9] Hurronath *v.* Rajah Indoo Bhusun, 8 W. R., 135. The non-receipt of rent under such circumstances may give the landlord a cause of action if it amounts to a *dispossession* of his *interest* in the demised premises.

[10] See Mr. Davis *v.* Kazee Abdool, 8 W. R., 55, 58; and Woomesh Chunder *v.* Rajnarain, 10 W.R., 15, 18.

[1] See sec. 7, cl. 3, of the Bill. In the statement of Objects and Reasons, Sir James says: "In s. 7, I have thought it right to introduce 2 clauses to meet the case, which often occurs, of the loss of land, part of an estate subject to an undertenure, during the subsistence of that tenure, by the encroachments of conterminous proprietors. It seemed hard that a title by prescription should be acquired against the superior landlord (assuming him to retain a reversionary interest in the soil) by such encroachments, whilst, for want of the *actual* right of possession, he was unable to resist them. His rights are protected by cl. 3. In like cases, where the sub-tenure is of that nature that the superior landlord retains no right in the soil but can only enforce the right to rent by the sale of the putnee or other undertenure, the rights of the auction-purchaser are protected by cl. 4." The second class of cases was practically provided for by sec. 7, Act XIV of 1859, corresponding to art. 121, Act XV of 1877.

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Prosunno Moyi Dasi v. Kalidas Roy discussed.

relating to prescription, was omitted from the Act as passed in 1859. It is true that the case of a landlord is excepted from the rule (laid down in art. 141 of Act IX of 1871 and art. 140 of Act XV of 1877), that the period of limitation for a reversioner begins to run from the time when his estate falls into possession. This might lend some support to the contention that a landlord (unlike *other* reversioners) is not entitled to count the period of limitation from the time when the estate falls into possession, that is, when he becomes entitled to *khas* possession. And it has been so held in some cases by the Calcutta High Court.[2] But considering the hardship[3] to which landlords would be subjected by the adoption of this rule, it is not unlikely that a different construction will be put upon the law. If possession does not become 'adverse' to the claimant until he himself is entitled to *immediate* possession,[4] it is clear that, under art. 144 of sched. ii, Act XV of 1877, a landlord, suing to eject the trespasser within twelve years after the determination of the lease, cannot be met by any plea of limitation. The only article applicable to the case is art. 144, and the *inference* drawn from the language of art. 140, not being a necessary one, may be disregarded in the strict construction of a law of limitation. The lessor is a *reversioner* whose suit as against the

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[2] See Prosunnomoyi *v.* Kalidas, 9 C. L. R., 347, following Lokraj *v.* Court of Wards, 14 W. R., 395; and Briudabun *v.* Bhoopal, 17 W. R., 377.

[3] They are unable to resist such encroachments.—See 10 W. R., 15, F. B. A suit for damages against a poor ryot would scarcely afford any relief.

[4] See the definitions of adverse possession, p. 145, *supra*.

*tenant* is provided for by art. 139. And the words "other than a landlord" in the next article (No. 140) were introduced probably with the object that the two articles might not overlap each other. A landlord or zemindar in this country has very often no reversionary right in the soil, and the Legislature has thought fit to deal separately with suits by 'a landlord' (who may or may not be a reversioner), and suits by a reversioner "other than a landlord." All that *necessarily* follows from the language of art. 140 is, that a landlord cannot take advantage of *that* article when he brings an ejectment against a person who has evicted his tenant. But as the possession of a trespasser does not *become adverse to the lessor* until he acquires a right to the possession of the demised premises (by the determination of the tenancy), his rights are saved by the general provision of art. 144. To hold that twelve years' possession by a trespasser of a part of the demised premises would bar the right of the lessor, although the lessee does not renounce his character as such, and the lease is still subsisting, is to violate the maxim that "prescription does not run against a party who is unable to act." (*Contra non valentam agere non currit prescriptio.*) The general principle of the law is to bar a person who has a right to enter if he does not exercise that right in a certain time, not to bar those who can not exercise that right.[5]

[5] In a later case decided on the 18th of August 1882 (Krisna Gobind *v.* Huri Churn, 12 C. L. R., 19), this question of limitation to a suit for ejectment against a person who had dispossessed the plaintiff's lessee during the currency of the lease, was again discussed before a division bench of the Calcutta High Court, consisting of two Judges, of whom one was a party to the decision reported in 9 C. L. R., p. 317. The Judges

LECTURE VI.

Possession by trustee's grantee.

The possession of trust-property by the trustee is deemed to be the possession of the *cestui que trust* or the beneficiary. But if the trustee alienates the property to an assign for valuable consideration, the possession of the assign becomes adverse to the beneficiary.[6]

Repudiation by trustee.

It has been held in America, that a trustee who distinctly and openly repudiates his trusteeship and assumes absolute ownership of the trust-property, may commence to acquire an adverse possession against his *cestui que trust.*[7] But under the Indian Trust's Act (No. II of 1882) if a trustee renounces his character as such, he does not thereby

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say:—"By what rule in the Limitation Act is the plaintiff's right to sue governed? It may fall either under art. 140 of the second schedule, or under art. 144. It will be convenient first to refer to art. 139. This deals with a case where the suit is by a landlord to recover possession from a tenant, and the time runs from the determination of the tenancy. That is the only section dealing expressly with the case of a landlord *as such.* The next article says that in a suit 'by a remainderman, a reversioner (other than a landlord) or a devisee, for possession of immoveable property,' the point from which time runs is 'when his estate falls into possession.' Probably in this article, the expression 'other than a landlord' means other than a landlord *as such* suing his *tenant.* If that be so, then that article would apparently govern this case, and the time would run from the termination of the ijara. If the case does not fall within the article, then it must fall within art. 144, as being a suit 'for possession of immoveable property or any interest therein not hereby otherwise specifically provided for.' Then the period of limitation begins to run from the time when the possession of the defendant becomes adverse to the plaintiff. 'Plaintiff,' by the interpretation-clause, includes any person through whom the plaintiff claims. But the plaintiff does not claim through the ijardar. Therefore possession adverse to the ijardar is not possession adverse to the present plaintiff. This conclusion is entirely in accordance with the construction put upon an earlier Limitation Act, in the case to which we have been referred, reported in 10 W. R., 15."

[6] Section 10, Act XV of 1877, and No. 134 of sched. ii. Darby and Bosanquet, p. 335.

[7] Angell, § 174; Banning, p. 188. For Indian cases, see Virasami *v.* Subba, I. L. R., 6 Mad., 54, 59.

extinguish the trust, and he is not thereby discharged from his office (secs. 71 & 77). And a trustee who has accepted the trust can not afterwards renounce it *except* with the permission of a competent Court or *with the consent of the beneficiary*, or by virtue of a special power in the instrument of trust. (Sec. 46.) Nor is a trustee allowed either for himself or another to set up or aid any title to the trust-property adverse to the interest of the beneficiary. (Sec. 14.) A proposed trustee may, before accepting the trust, disclaim it (sec. 10), and a proposed beneficiary may renounce his interest under the trust by disclaimer or by setting up a claim inconsistent therewith. (Sec. 9.)

Whilst the trustee is in possession of the estate, the right of the beneficiary is safe, so that if the trustee mistakes his beneficiary and makes over the profits of the estate to a wrong person, such wrongful recipient of the profits, it has been held in England, does not acquire a title by adverse possession against the rightful *cestui que trust.*[8] It being the duty of the trustee to pay over the profits to the beneficiary, payment to a wrong person will not give that person a title.[9] But if one of two beneficiaries is excluded by the other who received the rents to the exclusion of the trustee as well, limitation will commence to run against the excluded beneficiary.[10]

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[8] See Lester *v.* Pickford, 34 Beav., 576, cited in Lewin on Trusts, p. 752, 7th edition ; and Brown on Limitation, p. 275. But if a stranger takes actual possession of the property, sec. 10 of Act XV of 1877 will not protect the *cestui que trust.*

[9] See the latter part of the judgment of the Privy Council in Karan Sing *v.* Bakar Ali, I. L. R., 5 All., 1.

[10] Lewin, p. 751.

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Possession of the trust-estate by a trespasser.

If a trustee suffers adverse possession for the prescribed period, the right of the *cestui que trust* will be barred. If the trustee does not eject the trespasser, and the beneficiary does not compel him to do so within the prescribed time, the trespasser acquires a title by adverse possession.[1] The possession of trust-property by a purchaser from the trustee is adverse to the beneficiary.[2] In these respects, the relation of lessor and lessee is more favorable to the lessor than the relation of beneficiary and trustee to the beneficiary.

Possession by mortgagor's or mortgagee's grantee.

So long as the mortgagor, his representative or his assign, asserts a title to redeem, and advances no other title inconsistent with it, his possession of the mortgaged property does not become adverse to the mortgagee.[3] Such possession becomes adverse from the date of foreclosure.[4] The possession of a purchaser of the property from the *mortgagor* without notice of the mortgage, becomes adverse to the mortgagee, if the right of the mortgagee to enter into possession has accrued.[5] Even the payment of

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[1] Lewin, pp. 737, 738. The beneficiary may require the trustee to transfer the trust-property to him (sec. 56, Act II of 1882), or to compel him to perform any particular act of his duty (sec. 61, Act II of 1882).

[2] See sec. 10, Act XV of 1877, and arts. 133 and 134, sched. ii.

[3] Pran Nath Roy *v.* Rookea, 7 Moo. I. A., 323; (S. C.) 4 W. R., P. C., 37. The present Limitation Act, art. 147, sched. ii, however, expressly prescribes a limit of sixty years to a suit for foreclosure or sale, from the date when the mortgage debt falls due. In such suits, therefore, the question whether the mortgagor's possession was adverse or not can hardly arise.

[4] Ghinarain *v.* Ram Monaruth, 7 C. L. R., 580, and Brohmomoyee *v.* Jugobandhur, 7 C. L. R., 583.

[5] Angell, § 449, note; Anundo Moyee *v.* Dhonendraw, 16 W. R., P. C., 19, 20; and Brojonath *v.* Khelat Chunder, 16 W. R., P. C., 33.

interest by the mortgagor to the mortgagee will not render the possession of the purchaser other than adverse.[6]

The possession of a purchaser of the property from the *mortgagee* is adverse to the mortgagor and his representatives from the date of purchase, and is expressly protected by the Limitation Acts.[7]

"It has always been laid down" (says Lord St. Leonards in his Handy Book on Property Law, p. 117) "that neither the mortgagor nor the mortgagee can by any adverse act bar the right of the other."[8] A repudiation of the mortgagor's title, or the mere assertion of an adverse title by a mortgagee in possession, does not make his possession adverse, so as to enable him to shorten the period of sixty years within which the mortgagor may bring his suit for redemption.[9] Similarly the mortgagor's denial of the mortgage will not by itself be sufficient for abbreviat-

Repudiation by mortgagor or mortgagee.

[6] Brojonath *v.* Khelat Chunder, 16 W. R., P. C., 33, 35. For the English Law on the subject, see *Doe d.* Palmer *v.* Eyre, 17 Q. B., 366; Chinnery *v.* Evans, 11 H. L. C., 115; and Brown on Limitation, p. 309.

[7] See Radhanath Dass *v.* Gisborne & Co., 15 W. R., P. C., 247; and art. 134, sched. ii, Act XV of 1877. This article applies when the purchase purports to be a purchase of the property as an absolute property. It can not, of course, apply where the purchaser takes an assignment of the property subject to the mortgage, and is admittedly a representative of the mortgagor.

[8] See Deohoo Sahoo *v.* Syud Musceoollah, 21 W. R., 13. A mortgagee is not bound by a decision passed against the mortgagor in a case instituted against him by a third person, if the mortgage-bond was executed prior to the institution. See Karon Sing *v.* Bakar Ali, I. L. R., 5 All., 1, P. C.; Dooma Sahoo *v.* Joonarain, 12 W. R., 363.

Also Bonomali *v.* Koylas Chunder, I. L. R., 4 Calc., 692.

As long as the relation of mortgagor and mortgagee subsists, the possession of the mortgagor can not be adverse to the mortgagee—Ghinarain *v.* Rammonovutto, 7 C. L. R., 580.

[9] 10 W. R., 219, Ajoodhya Pershad *v.* Esharee Dyal; and I. L. R., 1 All., 655, Ali Mohammed *v.* Lalta Buksh, F. B.

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ing the sixty years' period prescribed by Act XV of 1877 for foreclosure or sale.

But the acquiescence of the party whose title is repudiated may change the character of the possession and estop him from taking advantage of these provisions of the law.

Case of a co-mortgagor redeeming the mortgage.

The mortgagee's possession *before* the mortgage is redeemed is possession for all the heirs of the mortgagor; and it is only *after* redemption that the possession of one of the heirs of the mortgagor who has redeemed the entire mortgage can become adverse to the others, even where the mortgagee had all along recognized that one alone as entitled to the equity of redemption.[10]

Adverse possession of right to redeem and right to foreclose.

A person, claiming the equity of redemption, paying interest on the mortgage, and in actual possession of the mortgaged *property* to the exclusion of the lawful representative of the mortgagor, may acquire a title by adverse possession against such representative.[1] So a person claiming the equity of foreclosure (or the right of the mortgagee) may, as

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[10] Umrunnissa *v.* Muhammad, I. L. R., 3 All., 24, F. B. See also Chathu *v.* Aku, I. L. R., 7 Mad., 26. In Nundo Coomar *v.* Broojo Bhokun (4 Wym., 36; Thompson, p. 212), the possession of a person who was *not* a legal heir of the mortgagor, but who had nevertheless paid off the mortgage-debt and executed a fresh mortgage, was held to be adverse.

It has been held by Pontifex, J., in an unreported case (second Appeal, No. 2035 of 1878, decided on the 10th March, 1880), that a mortgagor or his representative is entitled to a period of sixty years for the recovery of property redeemed by his co-mortgagor, inasmuch as the co-mortgagor in such a case stands in the shoes of the mortgagee. See I. L. R., 2 Mad., 223, Asansab *v.* Vamona.

[1] Cholonondeley *v.* Clinton, cited in Angell on Limitation, sec. 467, and reported in 2 Jac. and Walk., R. 1; and Nundo Coomar *v.* Brojo Bhookun, 4 Wym., 36. Receipt of profits of land from the mortgagee in possession, is not sufficient—Chathu *v.* Aku, I. L. R., 7 Mad., 26.

against the lawful representative of the mortgagee, acquire a title by adverse possession.[2]

Adverse possession against both mortgagor and mortgagee.

If after adverse possession has been acquired against the owner, but before the period of limitation has expired, he mortgages the property, limitation runs against *both* mortgagor and mortgagee from the date of dispossession. Mr. Hayes, in his Introduction to Conveyancing, has laid it down that "the effect of the statute must always be determined with reference to the actual state of the title when time begins to run, and that when the time has once commenced running (against the absolute owner), no subsequent alteration in the title will postpone the bar."[3] If the mortgagor makes payment of interest on the mortgage-debt, the Indian law, in this respect differing from the English law, does not give the mortgagee a fresh start as against the party who dispossessed the mortgagor.[4]

Possession of a trespasser on mortgaged premises.

Where a mortgagor in possession of the mortgaged property is dispossessed by a third party who does not claim either under the mortgagor or the mortgagee, the possession of such third party, it has been held, is adverse to the mortgagee, and he, as well as the mortgagor, is barred by the twelve years' limitation.[5] And where a mortgagee in possession of the mortgaged property is dispossessed by a person who claims adversely to both the mortgagor and the mortgagee,

[2] See Ammu *v.* Ramkrishna, I. L. R., 2 Mad., 226, 228.

[3] Darby and Bosanquet, p. 237.

[4] Compare 7 Will. IV and 1 Vict., c. 28, and sec. 6, Act XIV of 1859 and art. 146, Act XV of 1877; see Darby and Bosanquet, p. 356; Brown, p. 450; Banning, 157.

[5] See Sherumbur *v.* Bhowance, 2 N. W. P., 223, and Prosunna *v.* Ramkumar, W. R. Gap No., 1864, p. 375. See also I. L. R., 5 All., 1, P. C. (A case of *rehan.*)

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it has been held that the possession of such person is adverse to the mortgagor as well as to the mortgagee, and that the former as well as the latter will be barred by the twelve years' rule.[6]

But as, during the currency of a mortgage, one of the parties to the mortgage is not entitled to the immediate possession of the property, it may be doubted if the possession of a trespasser could be adverse to the party who is not entitled to such possession, and who can not, therefore, bring an ejectment against the trespasser.[7] It is settled law in this country that a decree obtained by a third party against the mortgagor in possession, after the date of the mortgage, is not binding against the mortgagee;[8] and as it follows that a decree obtained against a mortgagee in possession is not binding against the mortgagor, adverse possession against one of the parties to the mortgage, it may be said, cannot affect the other, unless the latter is also deprived of the possession of his right or interest.

Possession of a *bonâ fide* purchaser in cases of concealed fraud.

In the case of property purchased *bonâ fide* for valuable consideration from a party who had acquired it by a concealed fraud, adverse possession as against such purchaser commences from the time

[6] Ammu *v.* Ramkrishnr. I. L. R., 2 Mad., 226; see also Messrs. Gisborne & Co. *v.* Radhanath, 5 W. R., 253-9; and Syed Akbar *v.* Toolse Ram, 23 W. R., 17.

[7] See Vithoba *v.* Gangaram, 12 Bomb., 180, where it was held, that a trespasser on the possession of the mortgagee could only succeed to such estate as the mortgagee possessed, and that he could not in any way affect the equity of redemption.

[8] Bonomally *v.* Koylash Chunder, I. L. R., 4 Calc., 692; (S. C.) 1 Shome's Rep., 14; Dooma Sahor *v.* Joonaram, 12 W. R., 362. and Karan Sing *v.* Baker Ali, I. L. R., 5 All., 1. See also Krisnajee *v.* Gobind 9 Bomb., 275.

that the party entitled was deprived of the property by means of such fraud. The purchaser from a trustee or mortgagee may by due diligence discover the nature of the interest under which the seller has occupied, but the purchaser of property from a person who has acquired it by a concealed fraud can have no reason to suspect any defect in the title of the seller. This is why the Indian Limitation Acts do not place such a purchaser in the same category with purchasers from trustees, mortgagees and depositaries.[9]

Possession of Hindu widows and their grantees.

The possession of a Hindu widow or other female heir, taking a limited interest under the Hindu law, cannot of course be adverse to the reversionary heir. The possession of a *grantee* of the widow, also, is not adverse to the reversionary heir until she dies, for the grant is good at least for the lifetime of the widow.[10] A widow or a grantee of the widow cannot destroy the title of the heir by *allowing* a friend or relative to have twelve years' possession of the estate. Such possession shall be presumed to be possession with her or his consent, and cannot be adverse to the heir.[1] The possession of a son adopted by the widow, like the possession of a purchaser from the widow, does not become adverse to the heir until his right of entry accrues by the death of the

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[9] See the special report of the Indian Law Commissioners, dated 26th February 1842. Sir James Colvile in his amended Bill proposed that the possession of the purchaser should be deemed adverse from the date of the purchase, but he withdrew the proposition afterwards.

[10] Suntokhee v. Musst. Relasee, 10 W. R., 276 ; Pursut v. Palut, I. L. R., 8 Calc., 442.

[1] Shiroocoomaree v. Keshab, 18 W. R., P. C., 1, 3.

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Repudiation of reversioner's title.

Possession of a trespasser on the widow's estate.

widow.[2] A Hindu widow, it has been held by the Chief Court of the Panjab, cannot, by merely asserting an absolute proprietary title, make her possession adverse to the heir so as to bar his right after her death.[3] But where the widow is dispossessed, the possession of the trespasser is adverse, not only to the widow, but also to the reversionary heir after her. As the widow represents the whole estate of her husband, and as a decision against her with regard to such estate is binding upon the reversionary heir,[4] adverse occupation against her is adverse to the heir in the same way as adverse possession against the father is adverse to the son, or that against a deceased executor is adverse to the person who next represents the estate.[5] But under the *express* provisions of art. 142, Act IX of 1871, and art. 141, Act XV of 1877, the reversionary heir is entitled to count the twelve years from the death of the widow.[6] It is apprehended that sec. 9 of Acts IX and XV, and the general principles of law, would prevent the application of these articles to cases where the last male owner was dispossessed, and time commenced to run *before* the widow succeeded him. The subsequent alteration in the title would not postpone the bar of limitation.[7]

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[2] Srinath *v.* Mohesh Chunder, 12 W. R., F. B., 14; and Rajendro *v.* Jogendro, 15 W. R., P. C., 41.

[3] See Rivaz, p. 148.

[4] The Shiva Gunga Case, 2 W. R., P. C., 31; (S. C.) 9 Moo. I. A., 539.

[5] Nobin Chunder *v.* Issur Chunder, 9 W. R., F. B., 505; see also Amrittolall *v.* Rojonikant, 23 W. R., 214, P. C.

[6] A Full Bench of the Calcutta High Court, on the 17th August, 1883, overruled Saroda *v.* Doyamoyee, I. L. R., 5 Calc., 938, which was to a contrary effect; see also Chundranath Dass *v.* Asaram, 1 Shome's Rep., 167.

[7] See Darby and Bosanquet, p. 237.

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Possession of members of joint family.

The general rule, that the possession of one member of a joint Hindu family is the possession of all, does not apply where the claimant has been clearly excluded. In the latter case the possession is adverse, and time will run from such adverse possession.[8] But under the express rule laid down in art. 127, Act XV of 1877, limitation runs from the time when the exclusion becomes *known* to the plaintiff. Where the bulk of the estate of a Hindu family is held and managed by a single member of the family, and the other members receive and enjoy part of the lands as *seer*, the possession of the bulk of the estate by the manager is not adverse (even under Act XIV of 1859) unless there are circumstances to shew that they accepted the *seer* lands in lieu of the shares they would have been entitled to on partition.[9] Where one member of a family is in receipt of the rents of one part of an estate, and another in receipt of the rents of another part of the estate, and they have afterwards to account to each other in respect of the excess of receipts over their respective rights, the possession of the one cannot be adverse to the other.[10] If the rents and profits of the estate which the members respectively hold are brought into the common fund, and they participate in this fund, by reason of their living in commensality, there will be no adverse possession.[1] The mere fact that plaintiff's co-sharer

Possession of co-sharers.

[8] Jowla Bux *v.* Dharum Sing, 10 Moo. I. A., 511. The general rule does not also apply where there has been an award of partition. Runjeet *v.* Goberdhone, 20 W. R., 25, P. C.

[9] Runjit Sing *v.* Kooer Gujraj, L. R., 1 I. A., 9.

[10] Chand Huree *v.* Rajah Norendro, 19 W. R., P. C., 230.

[1] *Per* Sir Barnes Peacock in Luchman Sing *v.* Shumshere, 14 B. L. R., 373, P. C.; also see 3 Mad., 99; Govinda Pillai, Appellant; and

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was in possession of a certain plot of land, and the plaintiff not in actual possession of any part of it, would not constitute adverse possession. The possession would not be adverse until the plaintiff claimed or asserted some right in the land, and that right was denied by his co-sharer.[2] It would be adverse if the exclusive possession could not be accounted for by the fact of some arrangement having been come to, at a previous time, between the co-sharers.[3]

Possession how far evidence of title.

Possession (*i.e.*, possession with a claim of ownership) though held for a term less than the period of limitation is a good title against all persons except the rightful owner, and entitles the possessor to maintain ejectment against any person other than such owner.[4] If a plaintiff proves that he had possession, and that that possession has been forcibly or fraudulently disturbed by the defendant, he makes out a *primâ facie* title which it is for the defendant to rebut.[5] But where the defendant's possession is not shown to have commenced in wrong, he cannot be ejected except on proof of a superior title.[6] And if there is a possessory award[7] in favor of the defendant, or if the plaintiff has

7 C. L. R., 320, P. C.; (S. C.) I. L. R., 5 Bomb., 48, P. C., Lukshman Dada *v.* Ramchandra Dada.

[2] Shurfunnissa *v.* Kylas, 25 W. R., 53; Jhoomuck *v.* J. Burrell, 21 W. R., 52.

[3] Sheikh Asud *v.* Sheikh Akbar, 1 C. L. R., 364.

[4] Pemraj *v.* Narain, I. L. R., 6 Bomb., 215; Brown, 125, 136. See p. 172 (note 9).

[5] Ayesha *v.* Kanye, 13 W. R., 146; Trilochun *v.* Koylas, 12 W. R., 175.

[6] Arumugam, *v.* Perriyannan, 25 W. R., 81, P. C.

[7] Shibchunder *v.* Modhoosoodun, 1 W. R., 349; see also 24 W. R., 435; and I. L. R., 4 Calc., 699. But an order under sec. 52 (not sec. 55) of Beng. Act VII of 1876, is *not* conclusive evidence of possession. I. L. R., 10 Calc., 350.

failed to bring a summary suit for possession within six months, it would seem that in British India proof of anterior possession on the part of the plaintiff (for a time less than the period of limitation) would not be sufficient.[8]

The interest of disseizors transmissible.

A person who has taken possession of land without title has, while he continues such possession, and even before the statutory period has elapsed, a transmissible, devisable, and inheritable interest in the property, though one which is liable at any moment to be defeated by the entry of the rightful owner, and if such person be succeeded in the possession by one *claiming through him* who holds till the expiration of that period, such successor has then as good a right to the possession as if he had himself occupied for the whole period.[9]

In 1845, *W* buys a certain property in execution of a decree against *Z*. In 1849, *B* buys the rights and interests of *Z*, who continued in possession notwithstanding *W's* purchase, and obtains possession of the property. *W* sues *B* for possession in 1861. *B*, claiming as he does under *Z*, is entitled to add the period of *Z's* adverse possession to his own, and their united possession, which is adverse to *W*, reaches back to 1845, when *W's* right to sue accrued.[10]

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[8] Justice Prinsep's judgment in 5 C. L. R., 280; Wise *v.* Ameeroonissa, 6 C. L. R., 249, P. C.; Erteza *v.* Barry, 11 C. L. R., 393. But see 11 C. L. R., 399, 405, and 8 W. R., 387.

[9] *Per* Cockburn, C. J., in Asher *v.* Whitelock, L. R., 1 Q. B., 1; Darby and Bosanquet, p. 390; see also Brindabun *v.* Tarachand, 20 W. R., 114; and Gossain Dass *v.* Issur Chunder, I. L. R., 3 Calc., 224, 226; Pemraj *v.* Narayan, I. L. R., 6 Bomb., 215, 222.

[10] Woomachurn *v.* Ranee Mohamoya, Gap No. W. R., 130; see also Angell, para. 440, note.

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The interest of the disseizor is liable to be defeated by his written acknowledgment of the title of the disseizee at any time before the expiry of the period of limitation, and before the disseizor has transferred his possession to a third person by sale or mortgage. Before the prescribed period has expired, the disseizor may waive his own interest in the property.[1] But he cannot do so, after he has transferred the property to a *bonâ fide* purchaser, so as to affect the latter.

Even in the case of independent and successive trespassers, the rightful owner would be barred by limitation, if the event from which limitation runs occurred twelve years before the date of suit, and his case did not come under any of the exceptions allowed by the law.[2]

The question whether the right extinguished by limitation is transferred to the first or the last of the trespassers will be noticed elsewhere.[3]

Successive trespassers under art. 144, Act XV.

In cases falling under art. 145 of sched. ii, Act IX of 1871, and art. 144 of sched. ii, Act XV of 1877, that is, in cases where the plaintiff sues for possession of immoveable property, or any interest therein, not being cases specially provided for by the other articles, the plaintiff's suit may not be barred, although he, or the person under whom he claims, has not been in possession within twelve years of the institution of the suit. The defendant under that article can not add to his own possession the

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[1] Brown, 580; Angell, § 384, note.

[2] Banning, p. 106; Darby and Bosanquet, p. 391.

[3] See Lecture XI and Mr. Stokes's speech in the Legislative Council, 19th July 1877.

possession of any other person unless he claims under that other person. If (in cases coming under that article) the property has been in the possession of two *independent* trespassers, not claiming one under the other, the possession of one can not be tacked to the possession of the other, so that if the defendant *himself* has not held possession of the property for twelve years, he can not successfully plead limitation.[4]

Effect of attachments.

Where the Collector attaches an estate for the purpose of realizing the Government revenue due from it, and after some time makes over the surplus collections to one of the contending parties claiming the estate, the possession of the Collector during the attachment cannot be *added* to the subsequent possession of that party, under art. 145 of Act IX of 1871.[5]

Mere attachment, in execution of a decree, or in accordance with the provisions of Act IV of 1840, or the corresponding provision of the Criminal Procedure Code, does not in any way change the possession of the property so as to bring the owner's case within the law of limitation.[6] When possession of attached property is delivered to the defendant, then and then only does his possession become adverse to the plaintiff. If plaintiff was in actual possession before the attachment, and the

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[4] The word 'defendant' in art. 144 of Act XV includes a person *from or through* whom a defendant *derives* his liability to be sued (sec. 3). Article 145 of Act IX expressly mentioned 'the possession of the defendant *or of some person through whom he claims.*'

[5] See Karan Sing *v.* Bakar Ali, I. L. R., 5 All., 1, P. C.

[6] See Mulraja *v.* Narayansamy, 4 Mad., 281; Bhaguruttee *a.* Grees Chunder, 2 Hay., 511, 544; Calc. Sud. Dwn. Rep., 1857, p. 447.

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property is subsequently ordered to be released to him, he may be considered to have been in *constructive* possession of the same during the subsistence of the attachment.[7]

Reinstatement after temporary dispossession.

The temporary possession of property under an erroneous order of the Magistrate, when such order has been subsequently reversed, does not benefit the plaintiff if he was out of possession at the date of the order.[8] When the plaintiff forcibly dispossesses the defendant, and the defendant recovers possession under sec. 9 of the *Specific Relief Act*, *such temporary dispossession* does not amount to an interruption of the defendant's possession, or give the plaintiff a fresh start.[9]

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[7] Rambhat *v.* The Collector, I. L. R., 1 Bomb., 407.

[8] Mooktokashee *v.* Ranee Lukhee, 1 Hay., 306.

[9] See Sir James Colvile's Amended Bill, sec. 6; Golam *v.* Bissonath, 12 W. R., 9; Premchand *v.* Hurree Dass, 22 W. R., 259; Kunhi *v.* Changarachan, 2 Mad., 313. Sec. 9 of Act I of 1877 corresponds to sec. 15 of Act XIV of 1859.

Irrespective of the provisions of sec. 9 of the Specific Relief Act, mere prior possession is not sufficient to sustain an ejectment even against a wrong-doer, if the evidence shews that the title is not in the plaintiff. See *Doe v.* Kuppu, 1 Mad., 65; Nagle *v.* Shea, 8 Ir. R. C. L., 224, C. P.

# LECTURE VII.

## ON THE CONSTRUCTION OF STATUTES OF LIMITATION.

Remedial and penal statutes — Statutes of limitation, remedial or penal? — Statutes of limitation, construed with reasonable strictness — Difference between strict and liberal construction, narrowed in modern times — Equitable construction, not allowed — Statutes of limitation, generally construed according to their plain meaning — Interpretation, strict and liberal, grammatical and logical — Modern rule of interpretation — Exceptions — '*Other* cause' in sec. 14, Act XIV of 1859 — Technical words — 'May' — 'And' — Context — The title and preamble — Schedules — Interpretation clauses — Illustrations — How when the language is ambiguous — How when the language leads to absurdity or palpable injustice — Applied with stringency when the words are clear and precise — The reason of the law considered only when the words are ambiguous — Construed in favor of the suitor, if ambiguous — Instances, art. 166, Act IX of 1871 — Sec. 247, Act VIII of 1859 — Art. 176, Act XV of 1877 — Art. 171 — Art. 127 — Sec. 1, cl. 7, Act XIV of 1859 — Art. 11, Act XV of 1877 — Sec. 29, Act VIII of 1869, B.C. — Statutory *exceptions* construed *liberally* in *favor* of the suitor, when the words are not clear and precise — The rule as well as the exception applied with stringency when the words are clear and precise — Sec. 1, cl. 15, Act XIV of 1859 — The plain meaning of words departed from in very exceptional cases — Instances, secs. 20 and 21 of Act XIV of 1850 — Sec. 92, Act X of 1859 and sec. 58, Act VIII of 1869, B. C. — Art. 176 of Act XV of 1877 — Sec. 1, cl. 16, Act XIV of 1859 — Sec. 19, Act XIV of 1859 — Ordinary rules of interpretation — The true intention to be ascertained by legitimate means — What are or are *not* legitimate means — A statute is to be taken and interpreted as a whole: to be read in its natural and ordinary sense; to be taken together with laws *in pari materia* — The force of affirmative words — Construction of a term which occurs in several parts of the same Act — Construction put by contemporary lawyers — How intention is ascertained when language is equivocal — Imperative and directory enactments — What statutes do not embrace the Sovereign — Exceptions and separate provisoes — Repealing a repealing Act — Time when a statute comes into force — Statutes are not presumed to be retrospective — They do not *primâ facie* affect past transactions or pending proceedings — The General Clauses Act, 1868 — The word 'from' — Construction of a general statute must be general — Customs do not override the law of limitation — Retrospective operation of laws — As affecting vested rights, or mere procedure — Postponement of the operation of a law — How far a law of limitation may be presumed to be retrospective — Abolition or introduction of *exceptions* how far retrospective — The retrospective operation of Act XIV of 1859; of Act IX of 1871 — Mohes Lall *v.* Sumput Koweri discussed — *Generalia specialibus non derogant* — Sec. 6, Act IX of 1871 — Sec. 6, Act XV of 1877.

Remedial and penal statutes.

For purposes of construction, remedial statutes and those which concern the public good, are often

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distinguished from penal statutes and statutes encroaching on rights or imposing burdens. The latter, it is said, should be construed strictly;[10] and the former liberally,[1] that is, *ultra* but not *contra*, the strict letter. According to this distinction, *exceptions* in remedial statutes are construed strictly;[2] and *exceptions* in restrictive statutes are construed liberally.

Statutes of limitation, remedial or penal?

In this respect statutes of limitation have given rise to some conflict of opinion.[3] Some authorities would treat these statutes as belonging to the class of penal or restrictive statutes, and construe them strictly, that is, restrain them by exposition in favor of the suitor; while others would look upon them as statutes of repose on which the security of all men depend, and construe them liberally and beneficially so as to promote as completely as possible the suppression of the mischief intended to be remedied.[4]

Statutes of limitation, construed with reasonable strictness.

The policy of the statutes of limitation is certainly good, and should be encouraged, but as they are Acts which restrict or take away existing rights,

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[10] A penal law and specially one of so peculiar a character as that contained in sec. 9 of Bengal Reg. XV of 1793 (the law against usury) is *not* one to be *extended* by construction. (Shah Mukhan Lall *v.* Babu Srikissen, 12 Moo. I. A., 157; 11 W. R., P. C., 19.) A penal statute must be construed strictly. (The Empress *v.* Kola Lalung, I. L. R., 8 Calc., 214, 216.)

[1] A remedial act is construed liberally. (*In re* Gordon, 28 Beav., 5.)

[2] *Per* Blackburn, M. R., see Brown, 677.

[3] See the opinions of Heath, J., and Mr. Sedgwicke on the one hand, and those of Dallas, C. J., and Story, J., on the other. Wilberforce on Statutes (1881), p. 232, refers to these opinions.

[4] Reasons of public policy having led to the enactment of the statute, a court of law should not view it in an unfavorable light as an unjust and discreditable defence, but should give it such support as would make it what it is intended emphatically to be, a statute of repose. (*Per* Justice Story in Bell *v.* Morrison.)

they should be construed with *reasonable strictness*, so that they may not operate with *unnecessary stringency*.[5]

Difference between strict and liberal construction, narrowed in modern times.

The tendency of modern decisions, upon the whole, is to narrow materially the difference between a strict and a liberal construction. Remedial statutes are now construed with a *more strict* regard to the *language*, and penal statutes with a *more rational* regard to the manifest *aim and intention* of the Legislature, than formerly.[6] Justice Holloway goes even further: "I wholly repudiate," says the learned Judge, "interpretations strict or liberal according to the object-matter of the law. A barbarous code of penal laws was the parent of those doctrines, and the reason disappearing, we see by no doubtful symptoms that the doctrine is disappearing too."[7] The spurious princi-

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[5] See the judgment of Kindersley, V. C., in Edmunds *v.* Waugh, L. R., 1 Eq., 421, referred to in Banning on Limitation, p. 5.

Interpretation, strict and liberal, grammatical and logical.

[6] Maxwell on the Interpretation of Statutes, p. 256. Remedial statutes are to be construed *more* liberally than penal statutes, and penal statutes are to be construed *more* strictly than remedial statutes. (See Wharton's Law Lexicon.) A strict interpretation includes fewer particulars than a freer construction. (Kent's Commentaries, Lecture 20, p. 515.)

A statute is construed strictly when it is not regarded as including anything which is not within its *letter* as well as its *spirit*, which is not clearly and intelligibly described in the very *words* of the statute, as well as manifestly *intended* by the Legislature. When the words are *ambiguous*, they are construed in favor of the person who is to be affected by them.—Wilberforce, pp. 246—9; see also I. L. R., 8 Calc., 214, 216.

A statute is interpreted *liberally* when the *meaning* of the lawgiver is carried into more complete effect than a stricter interpretation would allow. (Kent's Commentaries, 8th Ed., Lecture 20, p. 515, note.) Interpretation resting upon a mere study of the words used has been called *grammatical* interpretation, and that resting upon any other method, *logical* or rational. (See Amos on the Science of Law, p. 67.)

[7] Syed Ali Saheb *v.* Zemindar of Salur, 3 Mad. H. C., 5. Nevertheless "it is unquestionably right," says Pollock, C. B., "that the distinction should not be *altogether* erased from the judicial mind."—Maxwell, p. 256.

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Equitable construction not allowed.

ple of *equitable* construction (by which an unequivocal law was sometimes extended, *ex ratione legis*, to cases not covered by the express terms thereof) is now altogether disregarded[8] as regards the construction of modern[9] statutes, except those which are strictly *in pari materia* with one which has already received an equitable construction.

Statutes of limitation, generally construed according to their plain meaning.

It is now settled law[10] that statutes of limitation, *like all others*, ought to receive such a construction as the language in its plain[1] meaning imports, that in construing these statutes the ordinary rules of interpretation must prevail; and that no equitable construction should be put upon them.

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[8] Maxwell. p. 233. In Mohummud *v.* The Collector, 21 W. R., 318. the Privy Council refused to put an equitable construction on Act IX of 1859, sec. 20, which is a special law of limitation, without any *express* saving in favor of persons under disability.—See also Beckford *v.* Wade, 11 Exch., 437; 17 Vesey, 92.

Modern rule of interpretation.

[9] In modern statutes it is often more difficult to find out the reason of the law and the intention of the Legislature. "In the case of modern popular legislation," says Professor Amos, "proceeding, as it does, through the medium of prolonged debate and of innumerable compromises and amendments on the original proposition, it must be doubtful from the very first whether the law passed could be said to contain in itself any one and self-consistent meaning at all." (The Science of Law, p. 60.) And the modern (general) rule, according to Bramwell, B., is, that statutes must be construed according to their plain meaning, neither adding to, nor subtracting from, them.—See 4 Exch., N. S., 629, cited in Brown on Limitation, p. 675.

[10] Luchmeebux Roy *v.* Ranjit Ram Panday, 20 W. R., 375, P. C.

Exceptions.

[1] An exception to this general rule arises when a word, having a wide signification, is used in company with other words of less extensive import, and which are in fact included in the general term. In such a case the general word is deemed to extend only to such matters or things as are *ejusdem generis* with those denoted by the other words. Thus the general term 'other cause' in sec. 14, Act XIV of 1859, has been interpreted to mean a cause *of a like nature* as 'defect of jurisdiction,' which expression precedes that term.—Chander Madhub *v.* Bissessuree, 6 W. R., 184, F. B. The words "applications for which no period of limitation is provided elsewhere in this schedule or by the Code of Civil Procedure, sec. 230," in

'*Other* cause' in sec. 14, Act XIV of 1859.

In a case free from all reasonable doubt as to the meaning of the Legislature, the construction of an

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No. 178, sched. ii of Act XV of 1877, have, on a similar principle, been construed to refer to applications *ejusdem generis* with applications specified in the schedule. (Gobind *v.* Rungun, 6 C. L. R., 345, 348; *In re* Ishan Chunder Roy, 8 C. L. R., 52.) It is true that, in the Government of Bengal *v.* Shurruffutoonissa (3 W. R., P. C., 31, 32), with reference to the words "minority or other good and sufficient cause" which occur in Bengal Reg. III of 1793, sec. 14, their Lordships of the Privy Council say that, "other good and sufficient cause" are words so comprehensive that they may possibly extend to anything that constitutes in the *ordinary* meaning of those words a good and sufficient cause. But this was only an *obiter dictum.*

Technical word.

Again, where a particular expression has, for a long time previously, acquired a special (technical) signification, that special sense (in the absence of a defining clause in the Act) may be attached to the expression without violating this general rule. Thus in Ruckmabye *v.* Mottichand (5 Moo. I. A., 234) the expression "beyond the seas" in 21st James I, c. 16, was construed, not literally, but as synonymous in legal import and effect with the words "out of the realm," or "out of the land," or "out of the territories." And in Moharana Futtehsangji *v.* Dessai Kulliauraeji (21 W. R., 178, P. C.), their Lordships of the Privy Council approve of the Bombay High Court rulings, which lay down that the term "immoveable property" in Act XIV of 1859 includes hereditary offices in a Hindu community, when such offices are incapable of being held by any person not a Hindu, because such offices under Hindu texts and Bombay Reg. V of 1827 had been previously treated as immoveables. (See the Collector *v.* Krishnanath, I. L. R., 5 Bomb., 322, where the Bombay cases and the Privy Council ruling are discussed.) The rule laid down by the Bombay High Court is based on the *absence* of a definition of "immoveable property" in Act XIV of 1859. This definition is now supplied by Act I of 1868. The correctness of the ruling in Roghu *v.* Kasi, 13 C. L. R., 263 (which professes to follow the P. C. case) may, therefore, be questioned. See p. 202 (*note*).

'May' 'And' 'Or.'

To give effect to the intention of the Legislature, the word 'may' in a statute is sometimes interpreted as equivalent to 'must' or 'shall,' but in the absence of proof of the intention of the Legislature, it is construed in its natural and, therefore, in a permissive, and not in an obligatory, sense. (Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C.) If a public officer is empowered to do an act for the benefit of persons who are specifically pointed out, and the conditions upon which they can call for its exercise are given, the power *must* be exercised. (*Per* Lord Cairns in Julius *v.* Lord Bishop of Oxford, 5 Appeal Cases, 214. See also Anund Chunder *v.* Punchoo Lall, 14 W. R., F. B., 33, 36; Kent's Commentaries, Lecture 20, p. 518, note; and Reg.

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Act must be taken from the bare words of the Act. It is not for Judges to invent something which they do not meet with in the words of the text (aiding their construction of the text always, of course, by the context).[2] The Judge's duty is to say what the law is,

v. Alloo, 3 Moo. I. A., 488.) As to the substitution of 'or' for 'and,' and *vice versâ*, see I. L. R., 7 Mad., 115, 122.

[2] See Crawford v. Spooner, 4 Moo. I. A., 179.

'Context.' The 'context' includes anything within the four corners of the Act. But the title, the preamble, the marginal notes, the illustrations, and the punctuation do not strictly form parts of the Act. According to Parliamentary practice, no amendments can be moved to marginal notes, stops, or title, as printed in the Bill. (See Roscoe's Digest, 14th Ed., p. 105; Maxwell, pp. 34-35; Kent's Commentaries, Lecture 20, p. 509; and The Collector v. Luckamont, 21 W. R., 358, 360. P. C.)

The title and preamble. The enacting portion of a statute is its most important part. The preamble and the title cannot cut down the clear and express provisions of the Act. (Kent's Commentaries, Lecture 20, p. 509; 2 Mad., 322; and Sutton v. Sutton, 22 Ch. Div., 511.) The preamble may (perhaps) be resorted to in restraint of the generality of the enacting clause when it would be inconvenient if not restrained (Kent, 510), and it may certainly be resorted to, in explanation of the enacting clause, if it be doubtful. (Kent's Commentaries, Lecture 20, p. 510; and Maxwell, p. 35.) Accordingly, the preamble of Act XV of 1877, short as it is, was referred to by the Calcutta High Court in construing arts. 178 and 176, sched. ii, Act XV of 1877. (See Ishan Chunder Roy's case, 8 C. L. R., 52; and Robarts v. Harrison, 9 C. L. R., 209, 212.) But when the words of the enacting clause are clear and positive, recourse must not be had to the preamble. (Kent's Commentaries, Lecture 20, p. 509.) The title, when taken in connection with other parts, may assist in removing ambiguities where the intent is *not plain*. (*Ibid.*, p. 509.) The title and the preamble of Act XIV of 1859 were referred to by Sir B. Peacock, C. J., in construing the ambiguous word 'suit' in that Act. (Hurrochurn v. Soorodhonee, 9 W. R., 403, 404, 406, F. B.)

Schedules. If a schedule appended to the statute and the enacting part are repugnant, the latter prevails over the former (Maxwell on the Interpretation of Statutes, p. 48.) It must, however, be noted, that Sched. II of Act XV of 1877 is an *important part* of the enactment. (See I. L. R., 3 Calc., 336, 339.) For the purpose of avoiding the necessity for undisciplined interpretation, the Indian Legislatur every often make use of 'interpretation clauses' and 'illustrations.'

'Interpretation clauses.' 'Interpretation clauses,' however, are not always strictly followed; a narrower or a more extended meaning is sometimes given to words defined by the Act. (Wilberforce, 298.) Sir Robert Stuart, C. J., in Uda Begam v. Imamuddin (I. L. R., 2 All., 74, 86), held, that definitions or interpretations of this kind being

not to make or give a new law. (*Jus dicere non dare.*) To go beyond the words, where they are unequivocal and precise, is to *legislate*, not to *interpret*.[3]

Where the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor

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necessarily of a very general nature, were controlled by subsequent and express provisions on the subject-matter of the same definitions, that they must yield to enactments of a special and precise nature, and that, like words in schedules, they should be received rather as general examples than as overruling provisions. The principle of this rule is recognized by the Legislature, when (as in sec. 3, Act XV of 1877) they introduce their interpretation clauses with the proviso, "unless there be something repugnant in the subject or context."

'Illustrations.'

'Illustrations' are only intended to assist us in construing the language of the Act. (*Per* Couch, C. J., in Shaikh Omed *v.* Nidhee Ram, 22 W. R., 367.) Where the language of the illustration is larger than the enacting portion of the section itself, the Court ought to construe the illustration strictly. (Peerun *v.* Field, 22 W. R., Cr. R., 66.) Although the illustrations may serve to exemplify the meaning of the law, they ought never to be allowed to *control* the plain meaning of the section itself, and certainly they ought not to do so, when the effect would be to *curtail a right* which the section in its ordinary sense would confer. (*Per* Garth, C. J., in Koylas *v.* Puddo, 8 C. L. R., 277, 283.) "These illustrations," says Sir R. Stuart, C. J., "although attached to, do not in legal strictness form part of, the Acts, and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Acts, and in that and in other respects they may be useful, provided they are correct." (Nanak Ram *v.* Mehin Lal, I. L. R., 1 All., 487, 495; see also Dubey *v.* Ganeshi, I. L. R., 1 All., 34, 36.) "The illustrations to the Penal Code," say a Full Bench of the Bombay High Court, "rank as cases decided upon its provisions by the highest authority, but as every authority may sometimes err, we are justified in asking whether this may have happened in the present instances." (Reg. *v.* Rahimat, I. L. R., 1 Bomb., 147, 155.) But the Indian Legislature appear to consider these 'illustrations' so far parts of the enactments themselves as to deem it necessary to *expressly repeal* them when required. (See, for an instance, the schedule of Act II of 1882. It repeals the first illustration of sec. 12, Act I of 1877.) And these 'illustrations' have been described as "not merely examples of the law in operation, but the law itself, showing by examples what it is."

[3] *Per* Tindal, C. J., in Hyde *v.* Johnson, 2 Bing., N. C., 776. See also Muhummud Bahadur *v.* The Collector, 21 W. R., 318, 320, P. C.

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limited by what the Judges, who apply it, may suppose to have been the reasons for enacting it.[4]

How when the language is ambiguous.

If, however, the terms of the law be of doubtful import, the reason of the law (*ratione legis*), its history (including the state of things at the time of its passing), and the clear enactments of other laws *in pari materia*, may be considered for the purpose of determining the true import.[5]

Professor Amos, in his Science of Law (p. 67), observes, that the process of investigating the intention and will of the Legislature must always commence, in the first instance, with an inquiry into the words used, and the meaning they were intended to bear. It is only (*a*) when the words are ambiguous, and the meaning, therefore, uncertain, or (*b*) when it is held undesirable, for some reason or other, to put the undoubted meaning upon the word, that other clues to the probable policy of the Legislature can be made available. Exception (*a*) has been already referred to. Exception (*b*) applies where the language of a statute in its plain meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some palpable absurdity or inconsistency, or to injustice and inconvenience. In such cases Judges deviate a little from the literal meaning of the words, and, out of respect to the Legislature, put a reasonable construction upon them. They do so under the conviction that the Legislature could not possibly have intended what its words signify, and that a

How when the language leads to absurdity or palpable injustice.

[4] Moonshi Buzloro Rahim *v.* Shumshonissa, 8 W. R., P. C., 3.

[5] See Austin's Jurisprudence, Vol. II, pp. 645, 649; Broom and Hadley's Commentaries, Vol. I, pp. 95, *et seq.*

modification of the language is necessary to meet its presumable intention.[6] This (exceptional) rule, however, does not give any scope for *general* considerations of policy or convenience. The grammatical sense may be extended or abridged, so far as is necessary to avoid the inconsistency and inconvenience, but no further.[7]

Applied with stringency when the words are clear and precise.

A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where such a law has been adopted by the State, for reasons which justify the rule in the majority of cases, it must, if *unambiguous*, be applied with stringency; and no individual case to which those reasons are inapplicable can be excepted from its operation. The general good of the community requires that even a hard case should not be allowed to disturb the law.[8] The Judge cannot, on equitable grounds, enlarge[9] the time allowed by the law, post-

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[6] Maxwell, p. 209; Ranchodas *v.* Ranchodas, I. L. R., 1 Bomb., 581, 585; The Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C.; Rhedoy Krishna Ghosh *v.* Kailash Chandra Bose, 13 W. R., F. B., 3; (S. C.) 4 B. L. R., F. B., 82; Gureebulla Sircar *v.* Mohun Lall Saha, 8 C. L. R., 409; (S. C.) I. L. R., 7 Calc., 127. This last case has been overruled by a Full Bench of the Calcutta High Court, but the general principle remains intact. See Mamtazul *v.* Nisbai, 12 C. L. R., 318.

[7] Wilberforce, p. 115; Warburton *v.* Loveland, cited at p. 159, I. L. R., 1 Bomb.; and in Kent's Commentaries, Lecture 20, p. 512.

[8] E. I. Co. *v.* Odit Churn Paul, 5 Moo. I. A., 43. Every case must be determined according to *law*, and not with reference to *hardship*. (*Per* Peacock, C. J., in Hurrochunder *v.* Soorodhonee, 9 W. R., 403, 410, F. B.) For it is notorious, that (supposed) hard cases have a tendency to make bad law, or, in other words, to produce erroneous decisions. *Per* Westropp, C. J., *In re* Rotansi, I. L. R., 2 Bomb., 148, 179.

[9] Kristo Komul Sing *v.* Hurree Sirdar, 13 W. R., F. B., 44; (S. C.) 4 B. L. R., F. B., 105; and 3 W. R., S. C., 5 (F. B.), Rajkristo Roy *v.* Dinobondhu Surma.

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pone its operation,[10] or introduce exceptions not recognized by it.[1]

The maxim *cessante ratione legis cessat ipsa lex* applies solely to precedents, and does not apply to statute law. For the law, as a positive command of the Legislature, may continue to exist although its *ratio* or reason has ceased, or is inapplicable to particular cases. The rule to be observed is not the *ratio legis*, but the law itself.[2]

The reason of the law considered, only when

Where the language of the law is *ambiguous*, the theory of the law may be taken into consideration,

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[10] 2 Mad. H.C., 268.

[1] Beckford *v.* Wade, 17 Vesey, 92 ; 11 Exch., 437; Raja Ievara Das *v.* Richardson, 2 Mad. H. C., 84 ; Mahummud *v.* The Collector, 21 W. R., 318, 320, P. C. ; Unnoda *v.* Kristo, 19 W. R., 5, P. C. In Prideaux *v.* Webber, it was decided that a plaintiff was barred by time, although during the latter part of the six years the Courts were closed in consequence of the rebellion, and it was then impossible for the plaintiff to bring his action. (Darby and Bosanquet, p. 17.) And in Rajkristo *v.* Dinobundhoo (3 W. R., S. C. Ct. Ref., 5) it was held by a Full Bench of the Calcutta High Court that, under Act XIV of 1859, limitation barred a suit even if the prescribed period expired on a Sunday, holiday, or *dies non*, and the suit was brought on the next open day. But in certain cases of forfeiture of rights arising from the non-deposit of money within the time, fixed by the law, or by the Court under the direction of the law (see Beng. Reg. XVII of 1806, sec. 52 of Act VIII of 1869, B. C., and sec. 214 of the Civil Procedure Code). Judges have, on *equitable* grounds, *extended* the time and given relief against forfeiture by allowing the *deposit* to be made on the next open day. See Dabee Rawoot *v.* Heeramun, 8 W. R., 223, 225; Hussan Ali *v.* Donzelle, I. L. R., 5 Calc., 906 ; Dahi Din *v.* Muhammad, I. L. R., 3 All., 850. In the first of those cases the Court was illegally and unexpectedly closed, and this was considered an additional reason for giving relief. As to cases where the law expressly gives the Court the power to extend the time, on sufficient cause shown, see Narain Mundul *v.* Banee Madhub, 12 W. R., F. B., 21. For the present law, as to the filing of suits, appeals, and applications on the next open day, see sec. 5, Acts IX of 1871 and XV of 1877. The words "the applicant *shall* within six months *deposit*" the costs, &c., in sec. 602, Civil Procedure Code, have been held to be merely directory, and not imperative. Burjore *v.* Bhagana, I. L. R., 10 Calc., 557, P. C.

[2] Austin, Vol. II, p. 652.

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the words are ambiguous.

in order to avoid a result which, according to that theory, would be extremely unjust. As a law of limitation may in general be assumed to be based on the theory of *laches*, the right of an owner who has not been guilty of *laches* may not be barred or extinguished by limitation, if the language of the law be *fairly open* to a reasonable construction in his favor.[3] Thus the words "discontinuance of the receipt of rent" in the 3 and 4 Will. IV, c. 27, were, in consideration of this theory, held to apply only to cases where the owner neglected to enforce his remedies with the *knowledge* that the rent due to him has not been paid, and not to a case where the original tenant continued to pay the rent, although the tenure had been transferred to a stranger (without the knowledge of the owner), and such stranger urged that the owner's right to the rent was extinguished by reason of his not having received the rent from the *actual* tenant.[3] But the words 'dispossession' and 'discontinuance of possession' in the same statute have been held not to be open to such a construction, and the owner's ignorance of the fact of dispossession is no bar to the operation of the statute.[4]

Construed in favor of the suitor, if ambiguous.

It has been said that (as a general rule) the language of an Act (especially if it is a modern Act) should be strictly construed.[5] This rule is, of course, applicable to statutes of limitation, which being restrictive of the ordinary right to take legal proceedings are so far *disabling* Acts. Before such a law

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[3] Adnam *v.* The Earl of Sandwich, 2 Q. B. Div., 485.

[4] Rains *v.* Buxton, 14 Ch. Div., 537.

[5] *Per* Garth, C. J., in Mamtazul Huq *v.* Nisbai, 12 C. L. R., 318, 321.

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is applied to any individual case, it must be clearly shown to come within some specific rule enacted by the law.[6] Where the law specifies the particular cases for which a particular period of limitation is provided, it ought not to be interpreted so as to include cases not within the strict meaning of the words used. Where the rule does not unequivocally and in precise language bar the proceeding, it is construed *in favour of the right to proceed.* The language of the rule is not strained in order to take away from any one the rights which, but for it, he would possess.[7]

Instances, art. 166, Act IX of 1871.

Thus the words "a decision *other* than a decree or order passed in a regular suit or *an appeal*" in art. 166, Sched. II of the Indian Limitation Act of 1871, which prescribed, for the execution of certain decisions, a *shorter* period of limitation than the ordinary period of three years, were construed to exclude an order in *any* appeal, whether regular or miscellaneous, and an order passed in a miscellaneous appeal was allowed to be executed as governed by the ordinary rule.[8]

Sec. 247, Act VIII of

Again, an order refusing to release from attachment property attached in execution, if passed without investigation of the claim of a third party under

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[6] See Lindley's Thibaut, p. 175.

[7] *In re* Ramsunker, 3 C. L R., 440; Robarts *v.* Harrison, 9 C. L. R., 209, 212; Umiashankar *v.* Chota Lal, I. L. R., 1 Bomb., 19; and Syed Mahomed *v.* Kanhya Lal, 2 W. R., 263. In this last case it was laid down that the Court would not go beyond the words even if there was reason to infer that the case was within the *spirit* of the particular rule of limitation.

[8] Umiashanker Lakmiram *v.* Chota Vajiram, I. L. R., 1 Bomb., 19. Under Act XV of 1877, there is no distinction, in this respect, between summary decisions and decrees in regular suits.

sec. 247, Act VIII of 1859, was not, it was held, governed by the one year's rule of limitation laid down for a similar order, passed after investigation, under sec. 246 of the Act.[9]

Art. 176, Act XV of 1877.

An application (by one of the parties) under sec. 516 or 525 of the Civil Procedure Code, that an award be filed in Court must, under art. 176 of Act XV of 1877, be made within six months; but it has been held, that the arbitrator may himself hand the award to the proper officer to be filed, even after the six months, the act of the arbitrator not being an *application* within the meaning of the rule.[10]

Art. 171.

The word 'plaintiff' in art. 171, Sched. II of the Limitation Act of 1877, has been construed as not including an 'appellant,' and an application by the legal representative of a *plaintiff appellant* was held to be not governed by art. 171.[1]

Art. 127.

The words "suits to enforce the right to a share in any property on the ground that it is joint family property" in sec. 1, cl. 13, of Act XIV of 1859 (corresponding to art. 127, Sched. II of Act XV of 1877) have been construed to refer to suits by one member against the managing and other members of the joint family, complaining of an ouster or of a failure to account for profits, and not to a suit for redemption by such a member, where the question of joint or not joint property has to be decided incidentally

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[9] Syed Mahomed *v.* Kanyha Lall, 2 W. R., 263.

[10] Robarts *v.* Harrison, 9 C. L. R., 209.

[1] In the matter of Ram Shunkur Bhadoory, 3 C. L. R., 440. Act XII of 1879, sec. 108, now extends art. 171 to appellants. The article does apply to the legal representatives of *decree-holders*. Gulabdas *v.* Lakshman, I. L. R., 3 Bomb., 221; see also I. L. R., 3 Mad., 236.

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as against strangers, *viz.*, the mortgagees of the family property, under a mortgage executed by the managing member.[2]

Sec. 1, cl. 7, Act XIV of 1859.

The words "any party bound by any order respecting the possession of property under Act IV of 1840," in cl. 7, sec. 1 of the Limitation Law of 1859, were held not to include a person bound by a similar order under chap. xxii, Act XXV of 1861, although the former Act had been repealed and re-enacted by the latter.[3] Section 3 of Act X of 1882 and sec. 3 of Act XIV of 1882 remove the difficulty suggested by these rulings, by expressly enacting that references in former Acts to the old codes shall be read as applying to the corresponding parts of the new codes. But even now, references to repealing laws cannot be treated as applying to the repealed laws. Accordingly an "order under sec. 280, 281, 282 or 335 of the Civil Procedure Code of 1877" in art. 11, Act XV of 1877, has been held not to include a similar order under the repealed Code of 1859.[4]

Art. 11, Act XV of 1877.

Sec. 29, Act VIII of 1869, B. C.

The words "the year in which the arrear claimed *shall have been due*" in sec. 32, Act X of 1859 (corresponding to sec. 29, Act VIII of 1869, B. C.)

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[2] Radhanath Dass *v.* Gisborne, 15 W. R., P. C., 24; (S. C.) 14 Moo. I. A., 1.

[3] Undhosh Narain *v.* Chutter Dharee, 9 W. R., 489. But it would have been otherwise if it had been provided that references to Act IV of 1840 should in future be treated as references to chap. xxii of Act XXV of 1861. See Kangali Chander *v.* Jomerudunnessa, 8 C. L. R., 154, in which case, in construing art. 46 of Act IX of 1871, orders under chap. xxii, Act XXV of 1861, were treated as including orders under chap. xl of Act X of 1872, because the Legislature had expressly substituted the latter for the former.

[4] Bissessur *v.* Murali, 11 C. L. R., 409; Rashbehary *v.* Buddun, 12 C. L. R., 550, 552. But '1877' in art. 11 may now be read as '1882.'

have, upon a *fair* construction in favor of the right to proceed, been held to mean not necessarily the year in which the arrear first became due, but the year in which the obligation to pay the arrear was *revived* by reason of a previous satisfaction of the claim being nullified by a decree between the parties.[5]

Statutory *exceptions* construed *liberally* in *favor* of the suitor, when the words are not clear and precise.

Statutory *exceptions* to the rule of limitation have sometimes been construed rather *liberally* in favor of the right to sue. Thus the words "that the complainant had demanded the money, and that the defendant had admitted the truth of the demand," in sec. 14 of Beng. Reg. III of 1793, and cl. 14, sec. 18, Mad. Reg. II of 1802, were "on a liberal, but yet a fair and just, construction" held to be satisfied even where no precise sum was mentioned by either party, or where the admission was made to a third party, and such admission did not amount to a promise to pay.[6]

So again, the words 'suit,' 'cause of action,' and 'defendant' in sec. 14, Act XIV of 1859 (corresponding to sec. 14, Act XV of 1877) were interpreted *liberally*, so as to embrace execution-proceedings against judgment-debtors and other cases which were clearly *intended* by the Legislature to be provided for.[7]

But where the language of the exception is precise

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[5] Ranee Surnomoyee *v.* Shoshi Mukhi Burmonea, 12 Moo. I. A., 244; 2 B. L. R., 10, P. C.; 11 W. R., P. C., 5; cf. Hurro Prosad Chowdhry *v.* Gopal Dass Dutt, I. L. R., 3 Calc., 817; (S. C.) 2 C. L. R., 450; 2 Shome's Law Report, 10; on appeal, 12 C. L. R., 129, P. C.

[6] Gopee Krishna Goshamee *v.* Brindabun Chunder Sircar, 12 W. R., P. C., 36; (S. C.) 13 Moo. I. A., 37; and Rajah Bommarauj *v.* Rungasamy, 6 Moo. I. A., 232.

[7] Hurrochunder *v.* Soorodhoni, 9 W. R., 403, 406 (F.B.)

LECTURE VII. and unambiguous (as in sec. 4, Act XIV of 1859, and Lord Tenterden's Act, sec. 1), it is safer to adhere to the words used.[8]

The words "any property *purchased bonâ fide* from a mortgagee" in the exceptionally *restrictive* provision of sec. 5 of the Limitation Act of 1859, which greatly reduced the period of limitation to which a plaintiff, suing for redemption, was ordinarily entitled, were construed with strictness against the purchaser and in favor of the plaintiff suing to recover the property. The purchase, it was held, must purport to be of the property as absolute property, and not merely of the existing rights of the vendor; and although the words "without notice" could not be found in the section, the expression *bonâ fide* was held to imply a want of notice of the infirmity of the title of the vendor.[9] The same rule of construction is applicable to the corresponding provision of Act XV of 1877, namely, to arts. 133 and 134 of the second schedule.

The words "*conveyed* in trust" in the corresponding provision of art. 134 of Act IX of 1871 were, however, interpreted *liberally*, so as to include *devises or bequests* in trust,[10] and this interpretation

[8] Hyde *v.* Johnson, 2 Bing., N. C., 776; Beedoobhooshun *v.* Enaet, 8 W. R., 1; Luchman *v.* Rumzan, 8 W. R., 513. For a similar ruling on sec. 1, cl. 15, Act XIV of 1859, see Luchmee Buxsh *v.* Runjeet Ram, 20 W. R., 375, P. C.

[9] Radhanath Das *v.* Gisborne, 15 W. R., P. C., 24 (S.C.), overruling the decisions of the High Court in 5 W. R., 253. The expression *bonâ fide* has been since omitted in the corresponding provision of Act XV of 1877, *viz.*, art. 134, sched. ii. See the remarks of Green, J., in Maniklal *v.* Manchorshi, I. L. R., 1 Bomb., 269, 280, which go to show that *bona fides* is not *necessarily* inconsistent with notice of infirmity of title.

[10] Maniklal *v.* Manchorshi, I. L. R., 1 Bomb., 269. The correctness of the principle of this construction is questionable. The general clause

has been adopted by the Legislature in Act XV of 1877.

The rule as well as the exception applied with stringency when the words are clear and precise.

Where the language of the statute is precise and unequivocal, and there is no sufficient reason to doubt that the Legislature has deliberately used such language, the Courts give effect to the plain meaning of the words, and apply the law with stringency, even *against* the suitor.

Sec. 1, cl. 15, Act XIV of 1859.

Thus the words "to suits against a mortgagee of any immoveable property for the recovery of the same, a period of sixty years *from the time of the mortgage;* or, if in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given in writing *signed by the mortgagee*, or some person claiming under him, from the date of such acknowledgment in writing," in sec. 1, cl. 15, Act XIV of 1859, were held to bar a suit even against a *usufructuary* mortgagee (whose possession could not be adverse to the mortgagor until the debt was paid off), and although an acknowledgment signed by the authorized *agent* of the mortgagee had been given within the time required by the law. Here the plain words of the law embraced *every* kind of mortgage, and excluded any signature other than that of the *party* himself.[1]

The plain meaning of words departed from

It is only in very exceptional cases that the literal construction of the law is avoided, and a reasonable

(art. 145, Act IX of 1871) might have been applied to the case with the same result, and a *liberal* interpretation of art. 134 was *not necessary* to meet the presumable intention of the Legislature.

[1] Luchmee Bux Roy *v.* Runjeet Ram Roy, 20 W. R., 375, P. C. For a similar construction of sec. 4, Act XIV of 1859, see p. 273. The signature of duly authorized agents *is* sufficient under Acts IX of 1871 and XV of 1877.

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in very exceptional cases.

construction put upon the words to meet the presumably real intention of the Legislature. When the strict letter of the law leads to palpable injustice, contradiction, and absurdity, out of respect to the Legislator, it is presumed that he used the words in a modified sense.

Instances,—secs. 20 and 21 of Act XIV of 1859.

Thus, according to the literal sense of sec. 20, Act XIV of 1859, no process of execution could ever issue to enforce a judgment, even within a week from the date of it, unless some proceeding had been taken to enforce it within three years next before the application for execution, and it was held that such a construction was *obviously insensible*, and that what the Legislature really intended was that no process of execution should be issued to enforce a judgment or order *after the expiration of three years from the date of it*, unless some proceeding to enforce it should have been taken within three years next before the application for such execution.[2]

On a literal construction of sec. 21 of the same Act, a judgment-creditor could not, *after* the expiration of three years from the date of the passing of the Act, apply *de novo* to enforce a judgment, which was in force on that date, however diligent he might have been in endeavouring, within those three years, to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. As such a construction would cause great

[2] The Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C., which upholds the Full Bench ruling of the Calcutta High Court in Kangali Churn Ghosal *v.* Bonomali Mullick, 7 W. R., 515, and disapproves the Bombay decisions in 3 Bomb., 177, and 5 Bomb., 102.

*inconvenience and injustice*, and give the Act an operation which would *retrospectively deprive* the creditor of a *right* which he had under the old law, it was held that the words "*nothing* in the preceding section shall apply to a judgment in force at the time of the passing of the Act" really meant that that *part* of the preceding section which *prejudicially* affected such a judgment should not apply to it, and that it might be executed according to the *enabling* provision of that section.[3]

Sec. 92, Act X of 1859, and sec. 58, Act VIII of 1859, B.C.

Again, the words "no process of execution shall be issued on a judgment, after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding Rs. 500, &c.," in sec. 92, Act X of 1859, if literally construed, might deprive the applicant, *without any fault on his part*, of the fruits of his decree, even if he applied for execution on the very day after obtaining the judgment. But the decree-holder should not suffer any loss by reason of the *laches* of the Judge. *Actus curiæ neminem gravabit.* The words "shall be issued" were, therefore, construed to mean "shall be applied for with success," so that if the *application* for execution was made within the time, a *process* in the shape of an attachment or otherwise might be issued even *after* the three years.[4]

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[3] See I. L. R., 3 Calc., 47. A decree in force on the 4th May 1859 could, under sec. 21 of Act XIV of 1859, be executed, although no proceeding to enforce it had been taken within three years before the application for such execution, and if a *bonâ fide* proceeding was taken within the time allowed by sec. 21, a *fresh* application for execution of the decree could, if necessary, be made under sec. 20, within another three years from the date when the last proceeding had been taken.

[4] Rhedoy Krisna Ghosh *v.* Koilash Chander Bose, 13 W. R., F. B., 3.

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The words "date of such judgment" in sec. 92, Act X, as re-enacted in sec. 58 of Act VIII of 1869, B. C., were, with some hesitation, interpreted, so far as a judgment for rent or money was concerned, to mean "the date when the rent or money is *adjudged to be payable.*" A literal construction would make any decree by which the amount payable becomes due by instalments or otherwise, at a date more than three years subsequent to the judgment, although obtained by consent, absolutely useless to the decree-holder, and would at the same time curtail the power of the Court to make a valid decree for a sum payable by instalments at a time more than three years from the making of it.[5] In a later case[6] it has been held, that this ruling oversteps the limits allowed to Judges to modify the language of an Act; that the Legislature in sec. 58 of the Rent Act has sufficiently expressed its intention that small decrees should not *in any event* be kept hanging over judgment-debtors for more than three years, and that although the section practically *curtails* the power of the Court as to making decrees ordering the payment of money by instalments, it does not deprive the Court of such power *altogether.*

The words "unless the judgment be for a *sum* exceeding Rs. 500" in the same section, if literally construed, would exclude judgments in suits, for the

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A similar interpretation has been put upon the corresponding words of sec. 58, Act VIII of 1869, B. C. See Deodhary *v.* Kunwar, 3 C. L. R., 189.

[5] Gureebullah Sircar *v.* Mohun Lall Shaha, 8 C. L. R., 409; (S. C.) I. L. R., 7 Calc., 127.

[6] See the judgment of the majority of the Judges in Mamtazul *v.* Nisbai, 12 C. L. R., 318, 328.

possession of land, valued above Rs. 500. But there cannot be any doubt that the Legislature intended to include this class of judgments in the exception, because there is no reason why money-decrees of a certain value should have a longer period of limitation than decrees for land of the same value. Here the reason and intention of the lawgiver control the strict letter of the law.[7]

Art. 176 of Act XV of 1877.

The words "the date of the award" in sec. 327, Act VIII of 1859 (corresponding to art. 176, Act XV of 1877), have (to avoid inconvenience and injustice) been interpreted to mean the time when it is given to the parties, so that they may be able to give effect to it, and not to mean the day written in the award as when it was made.[8]

Sec. 1, cl. 16, Act XIV of 1859.

The words "*to all suits* for which no other limitation is hereby expressly provided, the period of six years from the time the cause of action arose" in sec. 1, cl. 16 of Act XIV of 1859, have been held to be no bar to suits for divorce *a vinculo*, which at the time of the passing of the Act were unknown in India, and which the provisions of Acts IX of 1871 and XV of 1877 (statutes *in pari materia*) expressly exclude from their operation.[9] Here the literal construction would have included cases not contemplated by the Legislature, and would have been inconsistent with its "intention as shown by *other indicia*."[10]

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[7] See the judgment of Mitter, J., in 12 C. L. R., p. 325.

[8] Sreenath *v.* Koylas, 21 W. R., 248; Dutto Singh *v.* Dosad, I. L. R., 9 Calc., 575.

[9] Lord William Hay *v.* Gordon, 18 W. R., 480, P. C.

[10] See Austin's Jurisprudence, Vol. II, p. 1024.

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Sec. 19, Act XIV of 1859.

As the Sudder Courts in the three Presidencies of British India, in 1859, were not Courts established by Royal Charter, and as the Supreme Courts, which were then the only Courts established by Royal Charter, were subsequently replaced by the "Original Side" of the several High Courts, it has been held, that the words "Courts established by Royal Charter" in sec. 19 and other sections of Act XIV of 1859 were not intended to mean such Courts in the broad and general sense of the term, and that the High Courts, when exercising their appellate jurisdiction over the Mofussil Courts, like the quondam Sudder Courts, were *not* Courts established by Royal Charter within the meaning of Act XIV of 1859.[1]

Ordinary rules of interpretation.

Their Lordships of the Privy Council (in *Luchmee Bux Roy* v. *Runjeet Ram Pandey*, 20 W. R., 375) have laid down that, in construing the statutes of limitation, the ordinary rules of interpretation must prevail. The following[2] are some of the most important of these rules :—

The true intention to be ascertained by legitimate means.

I. The object of all the rules of interpretation being to discover the *true intention* of the law, whenever that intention can be accurately and indubitably *ascertained*, the Courts are bound to give effect to it.[3] The intention of the Legislature must, however, be ascertained by *legitimate means*.[4] What has been previously said or done by the Law Commissioners or by the members of the Legislative Council may have been altered, or, possibly, altogether abandoned before

What are or are *not* legitimate means.

[1] Kristo Kinkur Ghose v. Burrodakant Sing, 17 W. R., 292, P. C.

[2] A few other rules have already been referred to, see pp. 176—183.

[3] Kent's Commentaries, Lecture 20, 8th ed., pp. 510, 519.

[4] Brown, p. 672.

a contemplated measure has passed into a law.[5] Such statements or acts are therefore of little use in the interpretation of positive enactments.

An enquiry into the vicissitudes which a particular measure has experienced in the course of its passage as a bill through the Legislature, is also not a legitimate mode of ascertaining the intention of the Legislature.[6] In construing a statute the Court cannot look at a proposed bill to amend such statute.[7] The speeches in the Legislative Council, or the report of the Commissioners on which an Act may be based, should not be allowed to exercise any influence on the judicial mind.[8] The intention ought to be collected from what the Legislature has expressly stated in the law itself taken as a whole.[9] Conjectures as to the intention, if that is *unexpressed*, are inadmissible. Judges cannot fish out what possibly may have been the intention of the Legislature. If the Legislature intends that which it has not clearly expressed, if any other meaning is intended than that which the words purport plainly to import, another Act should supply that meaning, and supply the defect in the previous Act.[10] If the

[5] See Brown, p. 719.

[6] Walji *v.* Jaganath, I. L. R., 2 Bomb., 84, 88.

[7] *In re* Rannak Hussain, I. L. R., 3 All., 283.

[8] 14 B. L. R., 150; Brown, p. 718. The opinion of the Legal Member of Council and the Statement of "Objects and Reasons" were not allowed to be read in Court by Garth, C. J., in Guju Lall *v.* Futteh Lall, 6 C. L. R., 439, 441. Cf. Chunilall *v.* Bomanji, I. L. R., 7 Bomb., 310 and 315. The Statement of Objects and Reasons of the Contract Act was referred to by Prinsep, J., in I. L. R., 10 Calc., 192.

[9] Brown, pp. 673, 718; 1 Hyde, 100. "The true question is, what was enacted by Parliament, not what was said by individual legislators."—Sir J. F. Stephen.

[10] Crawford *v.* Spooner, 4 Moo. I. A., 179.

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words of a law are clear and positive, they cannot be limited by what the Judges who apply it may conjecture to have been the reasons for enacting it.[1] The *expressed* intention of the Legislature will of course control the construction of the words; and where the literal construction is obviously insensible, or leads to such inconvenience and injustice that the Legislature cannot reasonably be supposed to have intended it, an exception is allowed, and effect is given to the *presumably* real intention of the Legislature.[2]

A statute is to be taken and interpreted as a whole;

II. In interpreting an Act, the Court must not take one section only and see what its meaning is, but must look at the Act as a whole and see what was the intention.[3] One part of a statute must be so construed with the other parts that the whole may (if possible) stand.[4] Where two passages of an Act are so repugnant that they cannot *possibly* stand together, the earlier passage gives way to the later.[5] Otherwise, the one must be read as a qualification of the other, so that some effect may be given to each.[6]

to be read in its natural and ordinary sense;

III. The words of a statute are to be read in their natural and ordinary sense. But technical

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[1] Moonshi Bazlore *v.* Shumsoonissa, 8 W. R., P. C., 3.

In dealing with positive enactments, reasons founded upon *analogies* are scarcely applicable.—Ramchunder *v.* Jogeshchunder, 19 W. R., 353, P. C.

[2] Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47.

The *argumentum ab inconvenienti* is only applicable in cases of *doubt*, and not where the law is clear. (Abdul *v.* Manji, I. L. R., 1 Bomb., 295, 300.)

[3] Poorno *v.* Kristo, 23 W. R., 171.

[4] Broom and Hadley's Commentaries, Vol. I, p. 95; Maxwell, p. 25.

[5] Maxwell, p. 46.

[6] Shankar *v.* Vishnu, I. L. R., 1 Bomb., 67, 69.

terms must be taken according to the acceptation of the learned in each art, trade, and science.[7]

to be taken together with laws *in pari materia.*

IV. Statutes *in pari materia* (whether repealed or not) are considered as having one object in view, and are taken together as if one law, compared in their construction, and construed consistently.[8] But when the Acts are not *in pari materia*, the construction which has been put upon one, cannot be relied upon as a guide to the construction of another.[9]

The force of affirmative words.

V. Affirmative words in a statute do sometimes imply a negative of what is not affirmed as strongly as if it had been expressed.[10] *Expressio unius est exclusio alterius.* The express mention of one thing implies the exclusion of another.[1] But a special enactment is not impliedly repealed by a subsequent affirmative general enactment, if the two enactments are not so repugnant as to be incapable of standing together.[2] Nor are affirmative words without any negative, expressed or implied, sufficient to take away an existing right.[3]

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[7] Broom and Hadley, Vol. I, p. 95 ; Kent, p. 511.

[8] Brown, p. 679 ; Kent's Commentaries, p. 513 ; Wilberforce on Statutes, p. 260 ; Walji *v.* Jagannath, I. L. R., 2 Bomb., 88 ; The Collector *v.* Punniar, I. L. R., 1 Mad., 89, 114.

[9] Dyachand *v.* Hemchand, I. L. R., 4 Bomb., 515, 526. The Court-fees Act is not *in pari materia* with the Limitation Acts. But Acts XIV of 1859 and IX of 1871 although repealed are *in pari materia* with Act XV of 1877. "In dealing with one of several Acts relating to the same subject, we ought, as far as possible, to apply to the sections of the later Act the same method of construction which has been applied to the corresponding sections of the earlier."—Ulfatunnissa *v.* Hosain Khan, I. L. R., 9 Calc., 520, 525, F. B.

[10] Bai Udekuvar *v.* Mulji, 3 Bomb., 177.

[1] Abdul *v.* Manji, I. L. R., 1 Bomb., p. 307. But this rule is not *universally* applicable. See I. L. R., 8 Bomb., 313, 318.

[2] Unnoda *v.* Kristo, 19 W. R., 4, P. C. ; Sabapathy *v.* Narainsamy, 1 Mad., 115.

[3] Collector *v.* Lukhamini, 21 W. R., 358, P. C.

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Construction of a term which occurs in several parts of the same Act.

VI. If it be reasonably possible, the same construction should be given to a word throughout the enactment, unless there be something in the context repugnant to that construction.[4]

Construction put by contemporary lawyer.

VII. In the construction of statutes, the sense which the contemporary members of the profession had put upon them is of some importance.[5] The Legislature is presumed to know the construction put upon statutes by the Courts.[6] A long and uniform current of decisions should be upheld even if they are not strictly correct,[7] specially where they lay down a rule of property.[8] Where the course of decision is not long and consistent, or where it is manifestly wrong, the matter may be treated as *res integra*, that is, as a question which has not been concluded by authority.[9]

How intention is ascertained when language is equivocal.

VIII. For the true interpretation of a statute, the old law, the mischief felt, and the remedy in view, should be considered, if the words are not sufficiently explicit. The intention of the law is to be collected from these, as well as from the context of the Act to be interpreted, and of other Acts *in pari materia*.[10]

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[4] The Justices *v.* The G. I. P. R. Co., 9 Bomb., 217, 219.

[5] Kent, Lecture 20, p. 514.

[6] Wilberforce, p. 16; Eshan *v.* Prannath, 22 W. R., 513, 517; Probhakar *v.* Vishwambhar, I. L. R., 8 Bomb., 313, 321.

[7] Sadasiva *v.* Ramalinga, 24 W. R., 193, P. C.; Unnoda Prosad *v.* Kristocoomar, 19 W. R., 5, P. C. *Stare decisis*, to stand by matters decided, is a maxim of law. It has been said by Lord Mansfield that the certainty of a rule is of more importance than the reason of it. See also I. L. R., 7 Mad., 382.

[8] Appovier *v.* Ramashabha, 8 W. R., P. C., 1; Sudaburt *v.* Foolbash, 12 W. R., F. B., 1, 5.

[9] Moharana *v.* Dessai, 21 W. R., 178, 180, P. C.; see also 19 W. R., 5, P. C.

[10] Kent, Lecture 20; Brown and Hadley, p. 95; and Wharton's Law Lexicon.

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Imperative and directory enactments.

IX. A positive mandatory enactment is not necessarily *imperative*,—*i.e.*, obligatory with an implied *nullification* for disobedience. It may be *directory* only.[1] And although the exercise of a power is naturally permissive, there may be circumstances which may couple the power with a *duty* to exercise it.[2]

What statutes do not embrace the Sovereign.

X. Statutes limiting rights and interests are not to be construed to embrace the Sovereign or the Government, unless the same be expressly named or intended by necessary implication.[3] It is a universal rule that prerogative and the advantages it affords cannot be taken away except by the consent of the Crown embodied in a statute. This rule of interpretation is well-established, and applies not only to the statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rules recognized in England.

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[1] Law Reports, Probate Div., Vol. II. pp. 210, 216. See also I. L. R., 10 Calc., 557.

[2] 5 Appeal Cas., 214. See p. 177 (note), *supra*.

[3] Kent, Lecture 20, p. 507. In England the Crown is not bound by statutes of limitation, unless named.—Wilberforce, p. 73. But in the Bombay and Madras Presidencies, before Act IX of 1871 came into force, suits by the Collector representing the East India Company, or the Secretary of State for India in Council, were apparently governed by the *ordinary* rule of limitation.

[4] *Per* West, J., in Ganpat *v.* The Collector, I. L. R., 1 Bomb., 7, 9. It would appear to have been assumed in Acts IX of 1871 and XV of 1877 that easements might be acquired against Government, by *statutory prescription*, in the same way as they are acquired against private individuals. In Act V of 1882, it has been deemed necessary to make an *express special* provision in favor of Government. (See sec. 15, Expl. 4, para. 2.) Compare 5 Mad., 6. It may be here remarked, that even in England the Courts may, *independently of the statute, presume a grant* from the Crown, upon an uninterrupted enjoyment of twenty

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Exceptions and separate provisoes.

XI. If there be an exception in the enacting clause of a statute, it must be negatived in pleading; but if there be a *separate* proviso, that need not.[5] So far as laws of limitation are concerned, this technical distinction is perhaps of little use in British India. The Civil Procedure Code requires the plaintiff in all cases to state when his cause of action accrued, and, if the cause of action accrued beyond the period ordinarily allowed by any law of limitation, the ground upon which exemption from the law is claimed.[6]

Repealing a repealing Act.

XII. If a statute be repealed, and afterwards the repealing Act be repealed, this revives the original Act.[7] This common law rule has been abolished in British India.[8] For the purpose of reviving, either wholly or partially, a repealed Statute, Act or Regulation, it is necessary *expressly* to state such purpose.

Time when a statute comes into force.

XIII. A statute comes into operation from the very day it passes, if the law itself does not establish the time.[9]

Statutes are not presumed to be retrospective.

XIV. Although the Legislature possesses the power to divest existing rights, it is not to be understood as intending to exercise that power *retrospectively* to any greater extent than the express terms of, or necessary implication from, its language requires.[10] The pre-

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years. (Goodtitle *v.* Baldwin, 11 East, 488, cited in Banning on Limitation, p. 252.) As to *presumptions* against the Crown, arising from the acts of other persons, see also Brown, 244.

[5] Kent, Lecture 20.

[6] Act VIII of 1859, sec. 26; Acts X of 1877 and XIV of 1882, sec. 50.

[7] Kent, Lecture 20.

[8] See Act I of 1868, the General Clauses Act, sec. 3, and the Bengal Code of 1793.

[9] Kent, Lecture 20, pp. 501, 505.

[10] Icharam *v.* Govindram, I. L. R., 5 Bomb., 653.

sumption against the retroactive operation of a statute may (where no vested right would be taken away) be rebutted by the fact that a future time is fixed for its coming into operation.[1] When a statute is unconditionally repealed, it must be considered (except as to "anything done," *i.e.*, except as to transactions past and closed) as if it had never existed. A title acquired under an enactment of positive prescription before it is repealed, is a transaction past and closed within the meaning of this rule, and cannot *primâ facie* be retrospectively affected by a new law.[2]

They do not *primâ facie* affect past transactions or pending proceedings.

XV. In the absence of an express provision, the repeal of any Statute, Act or Regulation by any Act of the Governor-General of India in Council does not affect anything done or any offence committed, or any fine or penalty incurred, or *any proceedings commenced* before the repealing Act comes into operation.[3] Except when some provision is made to the contrary, all proceedings in a suit instituted before the repeal, including the appeal and special appeal, as well as specific proceedings in execution commenced *before* the repeal, are governed by the old law.[4] An application to execute a decree obtained in such a suit, if made *after* the repeal, would ordi-

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[1] *In re* Ratansi Kalianji, I. L. R., 2 Bomb., 148, 171; Towler *v.* Chatterton, 6 Bing., 258.

[2] Sitaram *v.* Khanderao, I. L. R., 1 Bomb., 286, 294; *In re* Ratansi, I. L. R., 2 Bomb., 148, 162.

[3] Act I of 1868, sec. 6; and Syud Nadir Hossein *v.* Bissen Chand, 3 C. L. R., 437, 438.

[4] Runjit Sing *v.* Meharban, 2 C. L. R., 391, 392, 396, F. B.; Ruttan Chand *v.* Himmantrao, 6 Bomb., 168. For the test by which an application in a *pending* proceeding may be distinguished from a wholly *new* proceeding, see Chinto *v.* Krishnaji, I. L. R., 3 Bomb., 214, and Rustomji *v.* Kessowji, I. L. R., 8 Bomb., 287, 293.

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narily be governed, not by the old, but by the new law.[5]

The General Clauses Act, 1868.

XVI. In all Acts made by the Governor-General of India in Council since January 1868,[6] unless there be something repugnant in the subject or context,

(*a*) words importing the masculine gender include females;

(*b*) words in the singular include the plural, and *vice versâ*;

(*c*) 'person' includes any company or association or body of individuals, whether incorporated or not;

(*d*) 'year' and 'month' respectively mean a year and month reckoned according to the British calendar;

(*e*) 'Immoveable property' includes land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;[7]

(*f*) 'moveable property' means property of every description except immoveable property;

(*g*) 'British India' means the territories for the time being vested in Her Majesty by the Statute 21

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[5] Govind *v.* Narryen, 11 Bomb., 111; Pasupati *v.* Pasupati, I. L. R. 1 Mad., 52. "Execution initiates a *new* set of proceedings."—Gurupadapa *v.* Virbhadrapa, I. L. R., 7 Bomb., 459, 462.

But see Behary *v.* Goberdhone, I. L. R., 9 Calc., 446.

Cf. sec. 3, Act XIV of 1882.

[6] See Act I of 1868, the General Clauses Act, sec. 2.

[7] The term includes incorporeal hereditaments. See the remarks of the Privy Council in Maharana Futtehsangji *v.* Desai Kullianraiji, 21 W. R., 178, 181, on the meaning of the term in Act XIV of 1859. It includes "growing trees," see Jagrani *v.* Gonesh, I. L. R., 3 All., 435. A right to officiate as priest at the funeral ceremonies of Hindus in a particular mouza is not "immoveable property" within the meaning of this definition. But see Roghu *v.* Kasi, 13 C. L. R., 263, and p. 177 (note), *supra*.

and 22 Vict., c. 106, other than the settlement of Prince of Wales' Island, Singapore, and Malacca ;

(*h*) 'High Court' means the highest Civil Court of Appeal in the part of British India in which the Act containing such expression shall operate.

The word 'from.'

XVII. In all such Acts made after the 3rd of January 1868, the use of the word 'from' is sufficient for the purpose of excluding the first in a series of days or any other period of time. (Sec. 3, Act I of 1868.)

In considering what is the length of a calendar month or year, it is sufficient to go from one day in one month or year, to the corresponding day in the next, and to exclude from the computation the day 'from' which the month or the year is calculated, so that two days of the same number are not comprised in it.[8]

The interpretation clause of Act XV.

XVIII. The interpretation of the following words in the Indian Limitation Act of 1877, is governed by sec. 3 of the Act :

Plaintiff, applicant, defendant, easement, bill of exchange, bond, promissory note, trustee, suit, registered, foreign country, and good faith.

Construction of a general statute must be general.

XIX. A *general* construction must be put upon the terms and clauses of a general statute ; their applicability must be determined by the nature of the thing

[8] See Maxwell on Statutes, p. 310 ; Kashi Kant *v.* Rohini Kant, 7 C. L. R., 342, 343 ; I. L. R., 6 Calc., 325 ; Banning on Limitation, p. 256 ; and Act I of 1868, sec. 3. A debt becomes due at the last moment of the period of time which is allowed to the debtor for payment ; limitation commences to run 'from' the last day of such period, and the day corresponding to that from which the computation of the limitation period begins, is the last day for bringing the suit. If the due date is the 11th April, the period of limitation commences to run *from* the 11th April, and ends on the 11th of April of some following year. The period from the 12th April to 11th April of the next year (*inclusive* of both days) is one year. See Deb *v.* Ishan, 13 C. L. R., 153.

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to be retrospectively construed,[5] so as altogether to deprive a plaintiff of a vested right of action or proceeding,[6] or to deprive a defendant of any right to treat the claim against him as *already barred*.[7] But they may be retrospectively construed so as only to shorten or lengthen the *period* of limitation for unbarred causes of action arising before they come into operation.[8]

When the retrospective application of an adjective law (including a law of limitation) would destroy a vested right (such as a right to revive an abated suit), or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then such law is not, any more than any other statute, to be construed retrospectively. This rule applies with greater force to a law which (like sec. 108 of Act XII of 1879) comes into force from the moment of its being passed.[9]

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[5] *Per* Westropp, C. J., in 2 Bomb., 148, 171, quoting the Delhi and London Bank *v.* Orchard, L. R., 4 Ind. App., 127 ; (S. C.) I. L. R., 3 Calc., 47.

[6] Jackson *v.* Wooley (8 E. and B., 784), as explained in Pardo *v.* Bingham (L. R., 4 Ch. App., 735), both of which cases are cited at p. 198, I. L. R., 2 Bomb.

[7] Abdul Karim *v.* Manji Hansraj, I. L. R., 1 Bomb., 295 ; see also 7 Mad., 283, 288, 298 ; I. L. R., 5 Calc., 897.

[8] I. L. R., 1 Bomb., 295, 303, 306, 307.

[9] Khusal Bhai *v.* Kabhai, I. L. R., 6 Bomb., 26. A Division Bench of the Calcutta High Court goes further, and, on the authority of Westropp, C. J., lays down, that the rule as to the retrospective operation of laws of procedure applies only where they do not *in any way prejudice* any of the parties to the suit.—Behari Lall *v.* Gobordhone, 12 C. L. R., 431, 434 ; (S. C.) I. L. R., 9 Calc., 446. But Westropp, C. J. (in I. L. R., 2 Bomb., 148), does not, at least in so many words, say so. Indeed there is in one sense an element of retroactivity in all laws, since no law can operate except by changing or controlling what would else have been different capabilities, or a different sequence of acts and events having their roots and motives in the past. (*Per* West, J., at p. 210, I. L. R., 2 Bomb.)

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Abolition or introduction of *exceptions*, how far retrospective.

The abolition of an exemption, on the ground of a particular *disability* to sue (such as plaintiff's absence or imprisonment) recognized by a repealed statute, has, where the language of the new law is general, been construed retrospectively, so as merely to shorten the *period* of limitation for enforcing a right.[10]

But the abolition of a mode of renewing the period of limitation by a positive act *inter partes*, such as an acknowledgment or payment by any one of several co-contractors (in the absence of a clear indication of the intention of the Legislature), has not been construed retrospectively. For such a construction *deprives* a plaintiff of his right of action as *revived* in its *entirety* by an acknowledgment or payment which took place before the abolition.[1] The introduction of a mode of interrupting the statute by a positive act *inter partes* has, on the other hand, been construed retrospectively, so as to enlarge the *time* of limitation by a positive act of acknowledgment or payment satisfying the requirements of the statute, although done before the passing of the statute.[2]

Upon a construction of the *particular words* of Reg. II of 1805, sec. 3, which for the first time excepted cases of possession obtained by violent or fraudulent means from the operation of the twelve years' rule of limitation, the benefit of the exception was given to a plaintiff whose suit had been insti-

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[10] Pardo *v.* Bingham, L. R., 4 Ch., 735; and Maxwell, pp. 198-9.

[1] Jackson *v.* Wooley, cited at p. 198, I. L. R., 2 Bomb. But the clear and precise language of sec. 18, Act XIV of 1859, rendered payments and oral acknowledgments made before 1862 ineffectual under Act XIV of 1859.

[2] Vincent *v.* Wellington, Long and T., 456; Darby and Bosanquet, p. 160. See p. 210, *infra*.

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tuted while the old law[3] had been in force for only two years, and was pending in appeal when the new law came into operation.[4]

The retrospective operation of Act XIV of 1859;

The terms of sec. 18, Act XIV of 1859, as modified by Act XI of 1861, expressly rendered the provisions of Act XIV applicable to all suits instituted after the 1st of January 1862, and inapplicable to suits instituted before that date. Accordingly a disability to sue on the part of the plaintiff, or verbal acknowledgment of liability, or a part payment or a payment of interest by the defendant. which would have given the plaintiff a *longer period* or a *fresh start* under the old law, was of no avail if the suit was instituted after the 1st of January 1862, when Act XIV of 1859 came into operation. In such cases Act XIV of 1859 had retrospective effect on events and transactions which had taken place before the Act had come into operation.[5] The hardship of an *expost facto* law in those cases was sufficiently provided for by the postponement of the operation of the Act. But on

[3] Reg III of 1793, sec. 14 ; and Reg. II of 1803, sec. 18.

[4] Lall Dokul Sing *v.* Lall Rooder Postule, &c., 5 W. R., P. C., 95. In this case the general question whether, where an Act of Limitation has been repealed, that repeal taking place at a period in a suit between its commencement and its final determination, is or is not to affect the decision on appeal, the original decree in the suit having been passed before the repeal, was raised, but not entered into by their Lordships. If the question is now raised, it will *primâ facie* be answered in the negative. See 6 Ad. and E., 951, referred to in Brown on Limitation, p. 684.

[5] As to *disability*, see Annandi Kowar *v.* Thakoor Panday, 4 W. R., Mis., 21 ; and Radhamonee Dasi *v.* Goluckchunder Chakerbutty, 1 W. R., 52 : as to *oral acknowledgment*, see Doyle *v.* Edoo Gazee.—Suth., S. C. C. Ref., p. 145 ; and Chamar Ullah Sirdar *v.* Lokenath Halder, *ibid*, p. 40 : as to *payments*, see Ramnarain *v.* Bhugwan, *ibid*, 92 : as to the effect of applications for execution, made after 1859, but before 1862, not being *bonâ fide* applications as required by Act XIV, see Rajah Satyasaran *v.* Bhyrubch., 11 W. R., 80,

general principles,[6] Act XIV of 1859 could not affect any title acquired, or revive any right to sue barred, under the old Regulations, at or before the date when the Act came into operation.

of Act IX of 1871.

The language of sec. 1, cl. (*a*), Act IX of 1871, distinctly makes the Act inapplicable to suits actually[7] instituted before the 1st of April 1873, and there is sufficient indication in the Act itself that the Legislature intended that from the day to which its operation was *deferred*, it should regulate the bringing of suits on causes of action which had accrued, or transactions which had taken place, before that date.[8]

An application for the execution of a decree being (ordinarily speaking) an application in the *suit* in which the decree was obtained, and the reasons for not applying the new rules of limitation to suits commenced before the 1st day of April 1873, being of equal force with regard to applications for the execution of decrees obtained in such suits, it has been held that, under sec. 1, cl. (*a*) of Act IX of 1871, applications for execution of a decree in a suit instituted before that day are governed by the old law.[9] The operation of Act XV of 1877 was postponed to

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[6] Sitaram *v.* Khanderao, I. L. R., 1 Bomb., 286; see also I. L. R., 2 Bomb., p. 171, and sec. 2, Act XV of 1877.

[7] Joyram Loot *v.* Pani Ram Dhoba, 8 C. L. R., 54.

[8] Abdul Kardim *v.* Manji Hansraj, I. L. R., 1 Bomb., 295; Ram Chunder *v.* Soma, I. L. R., 1 Bomb., 305. See also Madhavan *v.* Achadda, I. L. R., 1 Mad., 301. For a similar construction of 3 and 4 Will. IV, c. 27, see Angell *v.* Angell, 9 Q. B., 328; and Wilberforce on Statutes, p. 162. In the New York Statute of Limitation, causes of action which accrued before the Statute came into operation are *expressly* exempted (sec. 45).

[9] Mungul Persad *v.* Grijakant, L. R., 8 I. A., 123; (S. C.) 11 C. L. R., 113, P. C.

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the 1st day of October 1877, but there is no express provision in that Act similar to cl. (*a*), sec. 1 of Act IX. And the word 'suit' is expressly defined as not including an 'application.' It cannot, therefore, be said that (under Act XV) a thing which applies to the suit, also applies to an application in that suit; and as execution initiates a new set of proceedings, an application for the execution of a decree obtained in a suit instituted before the 1st of October 1877, if made after the 1st of October, is not a *proceeding commenced before* that date. Such an application would, therefore, be governed by Act XV of 1877, and not by the Act of 1871.[10]

In suits instituted on or after the 1st of April 1873, the new provisions of Act IX relating to *payments* by the debtor or his agent, or *acknowledgments* of liability signed by the debtor's *agent*, operate retrospectively upon payments and acknowledgments made before the Act came into operation, although such payments and acknowledgments were of no avail at the date when they were made.[1] In one case the Calcutta High Court held that in suits brought on or after the 1st of April 1873, such new modes of interrupting the statute serve even to revive debts which, according to the provisions of the old law, had been *already barred* before that

Mohesh Lall *v.* Sumpat Koeri discussed.

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[10] Gurupadapa *v.* Virbhadrapa, I. L. R., 7 Bomb., 459. But see Behary *v.* Goberdhone, I. L. R., 9 Calc., 446. This question has been lately referred to a Full Bench of the Calcutta High Court.

[1] Teagaraya Mudall *v.* Mareaffa Pellai, I. L. R., 1 Mad., 264. See also the judgment of Holloway, J., in Valia Tamburatti's case, I. L. R., 1 Mad., 228, and of Justice Maclean in Moheshlall's case, 7 C. L. R., 121. This is in accordance with the decision in Vincent *v.* Wellington cited above, see p. 207, *supra*.

date.[2] In that case the suit was instituted when Act IX of 1871 was in force, and the question was whether the right to bring the suit (*i.e.*, the remedy) having been actually barred under the former Act of 1859, it could be revived by the acknowledgment of an *agent* of the defendant made before Act IX was passed. Such acknowledgment was insufficient under the Act of 1859, but sufficient under the Act of 1871, to keep alive the debt. This question was answered by the Judges in the affirmative. The *dicta* of Justice Holloway[3] (not concurred in by Morgan, C.J.) support this view of the case, but none of the other cases referred to by the Calcutta Court goes to the length of holding that a right to sue already barred could be revived by Act IX of 1871. In *Teagaraya Mudali* v. *Mariapha Pellai* (I. L. R., 1 Mad., 264), although limitation had *commenced to run* under Act XIV of 1859, the remedy was *not barred* at the date on which Act IX of 1871 came into operation, and sec. 21 of the latter Act was allowed to have retrospective effect on transactions which had taken place before that date. In *Madhavan* v. *Achuda* (I. L. R., 1 Mad., 301) also, the right to sue was not barred when Act IX of 1871 came into force. On the other hand, Chief Justice Westropp in *Abdool Karim's* case (I. L. R., 1 Bomb., 305), Chief Justice Morgan in *Valia Tamburatti's* case (I. L. R., 1 Mad., 229), and Justice Pontifex in *Nakur Chunder Bose's*

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[2] Moheshlall *v.* Sumput Koeri, 7 C. L. R., 121 ; (S.C.) I. L. R., 6 Calc., 340 ; see also the judgment of Holloway, J., in I. L. R., 1 Mad., 228.

[3] In Valli Tomburatti *v.* Vira Rayan, I. L. R., 1 Mad , 229.

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case (I. L. R., 1 Calc., 328) and in *Nursing Doyal's* case (6 C. L. R., 489; (S. C.) I. L. R., 5 Calc., 897) held, that a remedy by suit *barred* by the existing law could not, in the absence of a clear indication of the intention of the Legislature, be revived by a new law enlarging the period of limitation, or introducing new modes of interrupting the statute.

The 'authentic' interpretation of Act IX of 1871 is, that "nothing in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred under any enactment thereby repealed."[4] If this declaration by the Legislature, and the rulings quoted above, had been brought to the notice of the Court in *Mohesh Lall's* case, it may be presumed that the Court would not have come to the conclusion that a right to sue barred under Act XIV of 1859 was capable of being revived by the provisions of the Act of 1871, simply because the debt itself had not been extinguished by the repealed Act of 1859.

*Generalia specialibus non derogant.*

It has been already observed that a *general* later Act does not repeal, control, or alter an earlier special or local one, by *mere implication.* Such an Act is presumed to have only general cases in view, and not particular cases which have been already provided for.[5] The maxim *generalia specialibus non*

[4] *Vide* sec. 2, Act XV of 1877. The same principle is recognized by the Legislature in sec. 72, Act XVII of 1879 (Deccan Agriculturists' Relief Act). See Dharma *v.* Govind, I. L. R., 8 Bomb., 99, in which West, J., refers to Mohesh Lall's case.

[5] Maxwell, p. 157. "The reason is, that the Legislature having had its attention directed to a special subject, and observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act, where it makes no special mention of its intention to do so."—Unnoda *v.* Kristo, 19 W. R., 5, P. C.

*derogant* applies.[6] It was accordingly held, that the general Law of Limitation (Act XIV of 1859), in the absence of any *express words* or *necessary implication*, did not repeal or affect the limitation clauses of the Bengal Rent Law (Act X of 1859),[7] or of the Act for the adjudication of claims to property seized as forfeited (Act IX of 1859).[8] But a limitation clause in a *general* code of procedure has been held to be modified by a subsequent *general* law of limitation. Thus the exception as to disabilities in the *general* Law of Limitation (Act XIV of 1859) was considered to have been incorporated with the limitation clause in sec. 246 of the *general* Act VIII of 1859.[9]

Sec. 6, Act IX of 1871.

The sixth section of Act IX of 1871 is partly founded on the general maxim quoted above. It expressly saves special and local laws "now or hereafter to be in force," so that whether the general Act is *later* or *not*, its provisions cannot be imported into any local or special law. And after the passing of that Act it was held[10] that the provisions as to disability contained in that or any other Act could not apply to a suit under the special Act XXV of 1857, sec. 9. Similarly, the provision in sec. 5 of Act IX as regards

[6] The Collector *v.* Punriar, I. L. R., 1 Mad., 89, 110.

[7] Unnoda Prasad Mookerjee *v.* Kristo Kumar Moitro, 19 W. R., 5, P. C. See also Paulson *v.* Modhusudan, 2 W. R. (Act X), p. 21, F. B.

Sec. 3 of Act XIV of 1859 partially corresponds to sec. 6 of Act IX.

[8] Mohomed Bahadoor Khan *v.* The Collector of Bareilly, 21 W. R., 318, P. C.; (S. C.) L. R., 1 Ind. Cas., 167.

On similar grounds the exceptions recognized by sec. 14, Reg. III of 1793, were not extended to the special limitation provided for by Act XIII of 1848. See Cal. Sud. Dew., 1857, pp. 688. 1197, and Huro Chunder Chowdhry *v.* Kishen Kumar Chowdhry, 5 W. R., 27.

[9] Musst. Phoolbas Koer *v.* Lalla Jogeshur Roy, 25 W. R., 285, P. C.; I. L. R., 1 Calc., 226.

[10] Thakur Kapitnath *v.* The Government, 13 B. L. R., 445; 22 W. R., 17.

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the period of limitation expiring on a day when the Court is closed, has been considered to be inapplicable to suits for arrears of rent under Act VIII of 1869, B. C.[1]

Sec. 6, Act XV of 1877.

It has been held by the Calcutta High Court that the language of sec. 6, Act XV of 1877, has introduced a change in the law as stated in the cases mentioned above. Under Act IX of 1871, the rule was that special and local *laws* of limitation were not to be affected by the general law; but under Act XV of 1877 the rule is that the *periods* of limitation prescribed by special or local laws shall not be altered or affected by the general law. This raises an *inference* that the Legislature intended that the *general provisions and exceptions* contained in Act XV of 1877 should be applicable to suits, appeals, or applications governed by special or local laws of limitation. Accordingly, the general provision of sec. 5, Act XV of 1877 (as regards the period of limitation expiring on a day when the Court is closed), has been applied to suits under Act VIII of 1869, B. C.,[2] and to suits under sec. 77 of the Registration Act, III of 1877.[3] Similarly, the general

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[1] Paran Chunder *v.* Mutty Lall, I. L. R., 4 Calc., 50; 2 C. L. R., 543. It may be observed that Act VIII of 1869 was passed by the local Bengal Legislature, and not by the general Indian Legislature, and it is but reasonable to expect that any modification of such an enactment by a general Limitation Act should be apparent on the face of the general law. Act X of 1859, it will be remembered, was passed by the *same* Legislature which passed Act XIV of 1859. The principle of the rule of interpretation adverted to above, therefore, applies with greater force to Act VIII of 1869, B. C., than to Act X of 1859.

[2] Golap Chand *v.* Kristo Chunder, I. L. R., 5 Calc., 314; Khoselal *v.* Gunesh Dutt. I. L. R., 7 Calc., 690.

[3] Nijabutollah *v.* Wazir Ali, 10 C. L. R., 333.

provisions of sec. 12, Act XV (as to exclusion of time occupied in obtaining copies of decrees, &c.), and of sec. 19, Act XV (as to acknowledgments of liability), have been considered applicable to applications and suits under Act VIII of 1869, B. C.[4] And the provisions of sec. 14, Act XV, have recently been applied to suits under the Registration Act.[5] But as these general provisions and exceptions *modify*[6] the periods of limitations prescribed by local and special Acts, they may be said to 'affect,' if not to 'alter,' those periods. And although the corresponding section of Act XIV of 1859 (sec. 3) referred to the *periods* of limitation only, the general provisions of that Act were held by the Privy Council to be inapplicable to suits for which a (shorter) period of limitation had been prescribed by a special Act.[7] Besides, under the well-established rule of construction to which we have referred, a mere *inference*, unless it is a necessary one, is not sufficient to rebut the presumption that the Legislature does not intend by a general enactment to interfere with a special one.[8] On the other hand, it should be remembered that Act XV expressly provides (see sec. 1) that secs. 2—25 shall not apply to suits under

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[4] Beharilall *v.* Mungolanath, I. L. R., 5 Calc., 110. In the report of this case a similar ruling of Sir Richard Garth is referred to. See Parbuttinath *v.* Tejmoy, I. L. R., 5 Calc., 303.

[5] Second Appeal No. 1204 of 1882, decided by Garth, C. J., and O'Kinealy, J., on 20th December 1883, Khetter *v.* Dinabashy, I. L. R., 10 Calc., 265.

[6] Musst. Phoolbas *v.* Lall Joggeshur, 25 W. R., 285, 288, P. C.

[7] Unnoda Persaud *v.* Kristo Coomar, 19 W. R., 5, P. C.; Mahomed Bahadoor *v.* The Collector, 21 W. R., 381, P. C. See also Hariram *v.* Vishnu, 10 Bomb., 201.

[8] 19 W. R., 5, 6, 7, P. C.

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two *particular* special laws, *viz.*, Act IV of 1869 and Mad. Reg. VI of 1831. From this it would seem that the Legislature intended that to suits under *other* special laws, those sections may, as far as possible, apply.[9]

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[9] Against this *inference* (taken by itself) it may be remarked that sec. 1 of Act IX also made a similar express provision, and notwithstanding such provision, it was held that the general provisions of Act IX did not affect suits under *any* local or special law.

But as regards Act XV, see further the recent case of Rama Raw *v.* Venkatisa (I. L. R., 5 Mad., 171, F. B.) In this case, the Judges of the Madras High Court were of opinion that sec. 19, Act XV of 1877, was applicable to summary applications under special and local laws, such as the Acts regulating the rights of landlord and tenant in the North-Western Provinces and in Bengal.

*Query*—If the general provisions of Act XV are applicable to suits and applications under all special and local laws, why has the Legislature *expressly* extended those provisions to suits under Act XVIII of 1881? (See sec. 23, Act XVIII of 1881, the Central Provinces Land-Revenue Act.)

# LECTURE VIII.

## THE STARTING POINT OF LIMITATION.—THE PERIODS OF LIMITATION.—THE OPERATION OF ACT XV,—GENERAL RULES AND EXCEPTIONS AS TO THE APPLICATION OF THE PERIODS OF LIMITATION.

Accrual of right to sue (art. 120) — In actions on contracts (art. 115) — Where there are successive breaches — Where there is a continuing breach (sec. 23) — Where no time is specified — Where money is payable on demand — In actions for torts (art. 36 and sec. 24) — Where there has been a continuing wrong (sec. 23) — Where there has been an illegal proceeding — In actions on *quasi* contracts — Instances of defendants' refusal being the cause of action — Cases where the plaintiff's knowledge is an element of the cause of action — Knowledge and means of knowledge — Date of accrual of right to sue not always identical with *terminus a quo* — *Terminus ad quem* — Periods of limitation — The 28 sections of Act XV — Operation of the Act as to time, sec. 2 — Operation, as to place, secs. 1, 6, & 11 — Operation, as to persons — Operation, as to subjects — Preamble, secs. 1, 6, and 10 — Rules and exceptions — First Rule, explanation and proviso, secs. 4 and 22 — Second Rule, complement and proviso — Sec. 25, Act I of 1868, and art. 85, sched. ii — Third Rule, sec. 12 — Fourth Rule, sec. 9 — Sec. 9 explained and illustrated — Proviso to the 4th rule explained — Prevention, suspension, and interruption of the operation of limitation, explained and illustrated — Fifth Rule, sec. 23 and arts. 19, 23, 42, 115 and 116 — Sixth Rule, sec. 24 and art. 25 — Exceptions to the application of the periods of limitation.

THE third column of Sched. II, Act XV of 1877, *specifies* the particular events from which limitation runs in *particular* cases. The *general* article (No. 144), relating to suits for the possession of *immoveable* property, or any interest therein not otherwise specially provided for, makes limitation start from the time when the possession of the defendant becomes adverse to the plaintiff. The question of *adverse possession* has already been considered. But

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there is a still more *general* article (No. 120), relating to "suits for which no period of limitation is provided elsewhere in this schedule" (Sched. II), which makes the time when the *right to sue* accrues, the starting point of the period of limitation. The question "when does the right to sue or the cause of action accrue" requires some notice here. It may be laid down that, in general, "the cause of action arises when and as soon as the party has a right to apply to the proper tribunals for relief."[10] And the infringement of the plaintiff's (substantive) right gives him a right to apply for relief.[1]

Accrual of right to sue (art. 120).

In actions on contracts. (art. 115).

In actions on contracts, the right to sue accrues at the time of the *breach* of contract, and not at the time when *knowledge* of the breach first comes to the plaintiff, except where the right to sue is fraudulently concealed by the defendant.[2] The time at which the *damage* arising from the breach occurs, does not also affect the starting point of limitation.[3] Where there are *successive* breaches, as, for instance, in the case of nonpayment of a bond payable by instalments, a fresh right to sue accrues upon every fresh breach, so that time may be a bar to the suit for the earlier breaches without affecting the suit for the subsequent

Where there are successive breaches.

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[10] Angell, para. 42.

[1] Jardine, Skinner & Co. *v.* Ranee Shamasoonderi, 13 W. R., 196.

It may be here observed, that a statement in the plaint as to the time when the cause of action arose does not absolutely bind the plaintiff. —Fuckeruddeen *v.* Mohima, I. L. R., 4 Calc., 529, 531. See also Phillips *v.* Nundo, 8 W. R., 385.

[2] Rajah Indro Bhusun *v.* T. J. Kenny, 3 W. R., S. C. Ct. Ref., 9; and sec. 18, Act XV of 1877; Roscoe's Digest, 613; art. 115, sched. ii. A similar rule applies to actions of *tort* (see p. 221), as well as to *other* cases (see Azrool *v.* Lalla, 8 W. R., 23).

[3] Darby and Bosanquet, p. 24.

Where there is a continuing breach (sec. 23).

ones.[4] Where the breach is a *continuing* one, as in the case of a tenant neglecting, in violation of his covenant, to keep the demised premises in repair, a fresh right to sue arises at every moment of the time during which the breach continues.[5] The cause of action in this case is said to be renewed *de die in diem*,—that is, renewed from day to day; and the suit is absolutely barred, only by the lapse of the prescribed period from the time when the breach *ceases* to exist.[6] Mr Shephard, in his work on the Limitation Acts, points out that this rule applies only to "contracts obliging one of the parties to adopt some given *course* of action during the *continuance* of the contractual relation." "Every breach persisted in" by the obligor is not a *continuing* breach. The relation between the contractor and contractee must *continue* to exist for *some time*, as in the case of partners, landlords and tenants, principals and agents, bailors and bailees; and "the matter to which the defaulting party is obliged should *not* consist of doing *specific* acts at *stated times*," such as paying rent every quarter, or rendering accounts every six months.[7]

Where no time is specified.

Where the time for the performance of the contract is not determined by the contract itself, where it is not a case of a promise to do anything at a *specified* time, or upon the happening of a *specified* contingency, where performance is due as soon as the creditor or obligee may desire it, the rule of English law (which, notwithstanding Austin's protest, has been adopted

[4] Art. 115; art. 74; Darby and Bosanquet, p. 100.

[5] Sec. 23, Act XV of 1877; Darby and Bosanquet, p. 100.

[6] See art. 115, sched. ii.

[7] See Shephard on Limitation, pp. 48, 49, 1st Edition.

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Where money is payable on demand.

by the Indian Legislature) gives the creditor or obligee an *immediate* right to sue, as in the case of goods sold without any specific credit, of money lent generally, or of money *lent* under an agreement that it should be payable *on demand.*[8]

The following passage from the Abstract of the Proceedings of the Legislative Council on the 19th July 1877, refers to this question : "In the case of suits for money lent under an agreement that it should be payable on demand, we had made the time run from the date of the transaction, instead of from the demand, the date prescribed by the present law,[9] the framer of which in this respect had followed a judgment of the Bengal High Court (6 B. L. R., 10), which judgment rested on what the authority[10] of Mr. Justice Holloway (*quis jure peritior?*) emboldened Mr. Stokes to call a mistake of Austin's. It seemed unreasonable that a creditor should be able to give himself an unlimited time to sue by merely abstaining from making a demand. Moreover, as Mr. Justice Innes, one of the Judges of the Madras High Court, observed, in a Minute to which the Committee were much indebted—'It is a well-known principle of English as well as Continental law, that the words *payable on*

[8] Austin, Lecture 25 ; art. 52, sched. ii, Act XV, art. 57 and art. 59. According to Austin, in these cases as well as in cases of deposits, a previous actual demand is necessary, for without it the *debtor* cannot *know* that he is breaking his obligation. But in Evans's Digest of the Statutes, it is pointed out that, in these cases (as *distinguished* from cases of *deposits* returnable on demand), there is an immediate duty, and that it is a perfectly legitimate conclusion that no demand can be necessary in addition to the duty itself. The Indian Legislature also distinguishes money deposits from loans, see arts. 59 and 60 of Act XV, and art. 145.

[9] Act IX of 1871.

[10] See 7 Mad., 293, 296, 300.

*demand* are not a condition. The creditor, by the clause, does not seek to impose a conditional obligation; he merely gives notice to the debtor that he is to be ready to pay the debt at any time when called upon. If the obligation depended upon a personal act of the creditor (as Savigny observes), it would be extinguished by his death before demand, which is not the case. Consistently with this view, it has always been held in England that a debt payable on demand was a debt from the date of the instrument, on which therefore the cause of action arose (*Norton* v. *Ellam*, and other cases), and that time runs from that date, and not from date of demand.' The Committee agreed with Mr. Innes in thinking it desirable that the law in India and that in England should be in accord on this point, as they were prior[1] to the enactment of Act IX of 1871."

In actions for torts (art. 36 & sec. 24).

In actions for torts not specially provided for in the schedule, time begins to run from the occurrence of the act or omission complained of, and not from its *discovery* by the plaintiff, nor (generally) from the time when the consequential damage ensues.[2] But where the consequential damage is the ground of action, where the tortious act itself, without specific damage, does not give rise to a cause

[1] But even prior to that date, the Bengal High Court did follow Austin in cases not governed by English law. (Poorna Chunder *v.* Gopalchunder, 17 W. R., 87.) The other High Courts followed the English law, see Vinayak *v.* Babaji, I. L. R., 4 Bomb., 230. Even in England, a bill or note payable *after demand* is not payable till demand is made. Banning, p. 27. Compare arts. 72 and 73 of Act XV. As to promises made in consideration of some *collateral* thing being done *on demand*, see Ramchunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 294.

[2] In these cases nominal damages are at once recoverable. See Banning, p. 270; Collett on Torts, para. 418; and art. 36, sched. ii, Act XV.

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Where there has been a continuing wrong (sec. 28).

of action, limitation runs from the damage accruing, and not from the *act* complained of.[3] In the case of a *continuing* wrong, limitation begins to run at every moment of the time during which the wrong continues.[4] Where the defendant obstructs a way, a watercourse or a drain, the cause of action is renewed *de die in diem*, so long as the obstructions are allowed to continue.[5] But in the case of a wrongful seizure of property under a process of Court, the continued detention of the property cannot be treated as fresh causes of action from day to day.[6] A party is not allowed to bring a fresh action merely because there has been a fresh damage, as where what was originally 'simple hurt' subsequently turns out to be 'grievous hurt.' In such a case, the damages have to be "assessed prospectively and once for all." But where the wrongful act is persisted in, and there is continuing *injury* as well as continuing damage, successive actions, it would seem, might be brought *toties quoties* (as often as might be necessary).[7]

Where there has been an illegal proceeding.

It is a mistake to suppose, that where a proceeding is illegal, and may be a cause of action, the cause of action does not arise until the proceeding has been set aside by the Court. There may be cases in which,

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[3] Darby and Bosanquet, p. 30; sec. 24 and art. 25, sched. ii, of Act XV of 1877; Bonomi *v.* Backhouse, 9 H. L. Ca., 503, which was a case of a subsequent subsidence of plaintiff's land caused by the excavation of defendant's contiguous land.

[4] See sec. 23, Act XV of 1877, and arts. 19, 23, and 42, sched. ii. (False imprisonment, injunction wrongfully obtained, and malicious prosecution.)

[5] Rajrup Koer *v.* Abul Hossein, I. L. R., 6 Calc., 394; (S.C.) 7 C. L. R., 529; Ramphull *v.* Misree, 24 W. R., 97.

[6] D. Hughes *v.* The Chairman, 19 W. R., 339; art. 29, sched. ii, Act XV.

[7] See Shephard, pp. 58, 59; and Whitehouse *v.* Fellows, cited at p. 58, *id.*

before an action can be brought, it is necessary to have the proceedings set aside; but where there is an entire want of jurisdiction, where the alleged wrong-doer is not acting judicially, and would have no protection from his judicial capacity, it is not necessary to wait until his illegal and unfounded proceedings are set aside.[8]

Breaches of contracts, and violations of rights *in rem*,[9] may give rise to causes of action without demand and refusal. But, in general, it may be said that *quasi*-contracts and *quasi*-delicts are merely sources of obligations, the *refusal* to fulfil which is properly the cause of action.[10] So far as the starting point of limitation is concerned, it does not appear that the Indian Legislature approves of this rule. Suits for contribution and suits for money had and received, which are founded in doctrines of equity, and which depend upon *quasi*-contracts, are provided for by arts. 99, 100, and 62 of Act XV of 1877. In *these* cases, at least, time is made to run from the

In actions on *quasi*-contracts.

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[8] *Per* Couch, C. J., 19 W. R., 339, 841.

[9] Torts, according to Austin, are violations of rights *in rem*. But where a duty is imposed upon a contractor by the common law or the custom of the realm (as the duty of a common carrier *irrespective* of any contract), he is, for breach of such a duty, generally sued in an action of tort, though, as the law *implies*, a contract to perform the duty; he may also be sued in an action of contract. See Mothoorakant *v.* I. G. S. Navigation Co., I. L. R., 10 Calc., 16[illegible]186.

[10] Austin, Vol. II, pp. 945, 946. See also Budrunnissa *v.* Muhommad Jan, I. L. R., 2 All., 671, 674. A *quasi*-contract denotes any incident by which one party obtains an *advantage*, which (in equity) he ought not to retain, or by reason of which he ought to indemnify the other. A *quasi*-delict denotes an incident by which *damage* is done to the obligee (though without intention or negligence, immediate or remote) and for which damage the obligor is bound to make satisfaction. See Rambux *v.* Modhoosoodun, 7 W. R., F. B., 377, 383.

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time when the right arises,—*i.e.*, from the occurrence of the incident which constitutes the *quasi*-contract, and not from the time when the obligor *refuses* to fulfil his obligation.[1]

Instances of defendants' refusal being the cause of action.

The defendant's *refusal* is the starting point of limitation in the following suits:—

In a suit against Government for compensation for land when the acquisition is not completed, time runs from the date of the *refusal* to complete. (Art. 18, sched. ii, Act XV of 1877.)

In a suit for the recovery of a wife, or for the restitution of conjugal rights, the period of limitation begins to run from the time when possession or restitution is demanded and *refused*. (Arts. 34 and 35.)

In a suit against a factor for an account, or by a principal against his agent for moveable property received by the latter and not accounted for, limitation begins to run from the time when the account is, during the continuance of the agency, demanded and *refused*. (Arts. 88 and 89.)

In a suit by a Mahomedan for exigible dower, the statute commences to run from the time when (during the continuance of the marriage) dower is demanded and *refused*. (Art. 103.)

In a suit to establish a periodically recurring right, the *punctum temporis* is the time when the plaintiff

[1] In other cases of *quasi*-contracts not expressly provided for in the schedule, the rule laid down by Austin may be followed, but as English lawyers generally treat many cases of *quasi*-contracts as genuine implied contracts, it may be doubted if the Courts will adopt that rule in every case.

A suit for the recovery of money paid by the plaintiff by mistake, and *bonâ fide* received by the defendant, should be preceded by a demand. Freeman *v.* Jeffries, L. R., 4 Exch., 199, 200. Student's Austin, 232.

is first *refused* the enjoyment of the right. (Art. 131.) See also arts. 78 and 129.

It has been already observed, that neither in cases of contracts, nor of torts, does the plaintiff's ignorance of the occurrence of the breach or the tortious act affect the accrual of the cause of action or the starting point of limitation. The Indian Legislature departs from this rule in the following cases, in which plaintiff's *knowledge* is made, for purposes of limitation, an ingredient of his cause of action.

Cases where the plaintiff's knowledge is an element of the cause of action.

In a suit against a person who, having a right to use property for specific purposes, perverts it to other purposes, limitation runs from the time when the perversion first becomes *known* to the party injured. (Art. 32, sched. ii, Act XV of 1877.)

In a suit for specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, the period begins to run from the time when the person having the right to the possession of the property first *learns* in whose possession it is. (Art. 48.)

In suits by principals against agents for neglect or misconduct (not being suits for moveable property received by the latter and not accounted for), the statute runs from the time when the neglect or misconduct becomes *known* to the plaintiff. (Art. 90.)

In suits to rescind a contract, or to cancel or set aside an instrument, or to declare the forgery of an instrument issued or registered, or for relief on the ground of fraud or mistake, plaintiff's *knowledge*

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materially affects the starting point of limitation. (See arts. 114, 91, 92, 95, 96.)

In a suit for property which the plaintiff has conveyed while insane, limitation runs from the time when the plaintiff being restored to sanity has *knowledge* of the conveyance. (Art. 94.)

In a suit for the specific performance of a contract, if there is no date fixed for the performance, time runs from the date when the plaintiff has *notice* that performance is refused. (Art. 113.)

In a suit to obtain a declaration that an alleged adoption is invalid, or never in fact took place, the *punctum temporis* is the date when the alleged adoption becomes *known* to the plaintiff. (Art. 118.)

In a suit by a person excluded from joint family property to enforce a right to share therein, the *terminus a quo* (the point from which the period commences to run) is the time when the exclusion becomes *known* to the plaintiff. (Art. 127.)

Knowledge and means of knowledge.

Under many circumstances, means of knowledge and actual knowledge may be very different things. But in no case is a man at liberty to shut his eyes to information within his reach, and so lengthen indefinitely the period of time within which he is to make his claim.[2]

There may be cases where the existence of the means of knowledge might lead irresistibly to the inference that the party had actual knowledge. Culpable and wilfully blind ignorance is equivalent to, or carries with it, the consequences of knowledge.[3]

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[2] Dhunput Sing *v.* Ruhoman, 9 W. R., 329; and 11 W. R., 163.

[3] Radhanath *v.* Gobind, 4 W. R., S. C. Ct. Ref., 19; Bibee Solomon *v.* Abdool, 8 C. L. R., 169, 184.

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Date of accrual of right to sue, not always identical with *terminus a quo*.

It may be here observed that, in cases not governed by the *general* articles in sched. ii, the time of limitation does not *necessarily* begin to run from the date of the accrual of the right to sue. Under the *express* provisions of the schedule, in some cases,[4] limitation runs from a time *after* the right to sue has accrued, and in a few other cases[5] it runs from a time *before* the right to sue has accrued.

*Terminus ad quem.*

The other *terminus* of the period of limitation (the *terminus ad quem*) is the last day when the plaint (in an ordinary suit) may be presented to the proper officer of the court.[6]

Periods of limitation.

The periods of limitation are always prescribed by positive law. The (general) periods prescribed are given in sched. ii, Act XV of 1877.

Ten specific periods are made applicable to *suits*. These periods (varying from 30 days to 60 years) are as follows :

| | | | | |
|---|---|---|---|---|
| 30 days | ... | One article | ... | Art. 1. |
| 90 „ | ... | One „ | ... | „ 2. |
| 6 months | ... | Three articles | ... | Arts. 3—5. |
| 1 year | ... | Twenty-four „ | ... | „ 6—29. |
| 2 years | ... | Seven „ | ... | „ 30—36. |
| 3 „ | ... | Seventy-nine „ | ... | „ 37—115. |
| 6 „ | ... | Five „ | ... | „ 116—120. |
| 12 „ | ... | Twenty-four „ | ... | „ 121—144. |
| 30 „ | ... | Two „ | ... | „ 145 & 146. |
| 60 „ | ... | Three „ | ... | „ 147—149. |

[4] For instances, see art. 10 (suit to enforce a right of pre-emption); art. 85 (suit for a balance due on a mutual account); art. 101 (suit for a seaman's wages).

[5] See art. 145 (suits against depositaries and pawnees), and art. 138 (certain suits by execution-purchasers).

[6] See sec. 4 of the Act. "The period of limitation ends on the day on which the plaint is duly lodged." (Morley's Digest, Vol. I, p. 246.)

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Six several periods are specified as applicable to *appeals*. These periods (ranging from 7 days to 6 months) are :

| | | | | |
|---|---|---|---|---|
| 7 days | ... | One article | ... | Art. 150. |
| 20 „ | ... | One „ | ... | „ 151. |
| 30 „ | ... | Three articles | ... | Arts. 152—154. |
| 60 „ | ... | One article | ... | Art. 155. |
| 90 „ | ... | „ „ | ... | „ 156. |
| 6 months | ... | „ „ | ... | „ 157. |

Ten different periods are allowed for *applications*. These periods (varying from 10 days to 12 years) are as follows :

| | | | | |
|---|---|---|---|---|
| 10 days | ... | Two articles | ... | Arts. 158 and 159. |
| 15 „ | ... | One article | ... | Art. 160. |
| 20 „ | ... | Two articles | ... | Arts. 161 and 162. |
| 30 „ | ... | Eight „ | ... | „ 163—170. |
| 60 „ | ... | Four „ | ... | „ 171A, 171B, 171C and 172. |
| 90 „ | ... | Two articles | ... | „ 173 and 174. |
| 6 months | ... | Three „ | ... | „ 175—177. |
| 3 years | ... | Two „ | ... | „ 178 and 179. |
| 6 „ | ... | One article | ... | Art. 179. |
| 12 „ | ... | „ „ | ... | „ 180. |

The 28 sections of Act XV.

The first three sections of Act XV of 1877 relate to *preliminary* matters. Sections 4—25 (together with sched. ii) are concerned with the *limitation* of suits, appeals, and *certain* applications to Courts. Sections 26 and 27 provide rules for the acquisition of easements, including *profits á prendre*, by *positive prescription*.[7] And the last section (sec. 28) relates to the indirect acquisition of the ownership of corporeal property by *extinctive prescription*.

[7] Secs. 26 and 27 and the definition of 'easement' in sec. 3 do not apply to the Presidency of Madras, the Central Provinces and Coorg. See sec. 3, Act V of 1882.

(The following remarks mainly refer to the *limitation of suits.*)

The *operation* of Act XV may be considered with reference to—the circumstances of *time* and *place*, the *persons* to whom it is applicable, and the *subjects* (sorts of suits, appeals and applications) to which its provisions wholly or partially apply.

Operation of the Act as to time, sec. 2.

I. With regard to the circumstance of *time*, it may be observed that the Act was passed (*i.e.*, received the assent of His Excellency the Governor-General) on the 19th July 1877, but did not come into force on that date. Its operation was postponed to the 1st October 1877, the day on which the Civil Procedure Code of 1877 came into force. The Act operates upon suits[8] instituted on or after the said 1st day of October, save and except suits for which *longer* periods of limitation were allowed by Act IX of 1871. As to these exceptional suits (see for instances arts. 59, 73, 118, 119, 127, 146, &c.), the operation of the Act was further, temporarily, deferred. Titles already acquired, and causes of action already barred, are expressly saved from the operation of the law. With these exceptions, the Act applies to transactions which took place before or after the 1st October 1877, and to causes of actions which accrued before or after that date.[9]

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[8] The Act applies also to appeals presented and applications made on or after that date. As to applications in execution of decrees obtained in suits *instituted before* the 1st October 1877, there is some difference of opinion. See Gurupadapa *v.* Virbhadropa, I. L. R., 7 Bomb., 459; and Behary *v.* Gobordhone, I. L. R., 9 Calc., 446. Both these cases are referred to in Lecture VII, p. 210.

[9] Sec. 2, Act XV, and Lecture VII, pp. 205, 206.

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Operation, as to place, secs. 1, 6, & 11.

II. In respect to the circumstance of *place*, it may be remarked that the territorial operation of the Act extends to the *whole* of British India, including the scheduled districts as defined in Act XIV of 1874. In other words, it extends to the territories for the time being vested in Her Majesty by the Statutes 21 and 22 Vict., c. 106 (an Act for the better government of India) other than the Settlement of Prince of Wales' Island, Singapore, and Malacca.[10]

It is expressly declared that the limitation laws of *foreign States* shall have no application in the Courts of British India, even in respect of contracts entered into in such States, unless such laws have *extinguished* the contract, and the parties were domiciled there during the periods prescribed by such laws.[1]

As to *local* (and special) laws[2] in force or hereafter to be in force in British India, it is enacted that the *periods* of limitation specially prescribed by such laws shall not be altered or affected by the Act.[3] A local (or special) law, sometimes, *expressly* extends the *general provisions* of the Act to cases for which special periods are prescribed by such law. Thus sec. 23 of Act XVIII of 1881 (The Central Provinces Land-Revenue Act) enacts that, in *computing* certain periods of limitation prescribed by that Act, and in *all* respects not therein specified, the provisions of the Indian Limitation Act, 1877, shall apply.

Operation, as to persons.

III. The persons affected by the Act. The Act applies to *all* persons who may sue or be sued in the Courts of British India, including the Government.

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[10] See Act I of 1868. [1] Sec. 11; and Lecture II, pp. 43—48.

[2] Such as the Dekkhan Agriculturists' Act (XVII of 1879), sec. 72.

[3] See sec. 6.

It applies to subjects as well as to aliens,[4] to juristical[5] as well as to natural persons, to Christians as well as to Hindus, Mahomedans, and others.

Operation, as to subjects.

IV. The *subjects* to which the operation of the Act extends.

A power of sale or a power to adopt a son is not within the purview of the Act. There is no limitation to the *exercise* of such a *power*.[6]

Preamble, secs. 1, 6, & 10.

The Act governs all *suits*, not being suits under the Indian Divorce Act (IV of 1869), or suits relating to certain hereditary offices in the Revenue and Police Departments, under Madras Regulation VI of 1831. The Act further applies to all appeals and applications to Courts, specified in the second and third divisions of sched. ii, and to other applications *ejusdem generis* with the applications so specified. Applications for certificates under Acts XXVII of 1860 and XL of 1858, and applications for probate or letters of administration,—not having any connection with any suit pending or already decided,—are not governed by the provisions of the Act.[7]

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[4] As to suits by aliens, and by or against foreign and native rulers, see chap. xxviii of Act XIV of 1882. The time during which an alien enemy is prevented from suing is not excluded in his favor. There is one important difference in the application of sec. 7 of the Act to persons not domiciled in British India. A person *domiciled* in British India attains his majority according to the provisions of Act IX of 1875. But other persons are in this respect governed by the law of their own domicil. So far as the cessation of minority is a starting point of limitation, there is a difference in the application of the Act to these classes of persons.

[5] A corporation, a Hindu idol, &c., are juristical persons.

[6] Joychunder Roy *v.* Bhyrub Chunder Roy, decided by the Calcutta Sudder Court on the 18th December 1849. (Calcutta Sudder Dewanny Rep., 1848, p. 461.) See also Bamundoss *v.* Tarinee, 7 Moore's I. A., 169; and Mason *v.* Broadbent, cited in Banning, p. 278.

[7] *In re* Ishan Chunder Roy, I. L. R., 6 Calc., 707; 8 C. L. R., 52.

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Further, the Act does not apply to applications which the Court has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character.[8]

Again, suits against express trustees, or their representatives (not being assigns for valuable consideration), for the purpose of *recovering the trust-property for the trusts in question*, are exempted from the operation of the Act.[9] In order to bring the case within this exception, the trusts must be shown to have been created for some definite or particular purpose or object as distinguished from trusts of a general nature, such as the law impresses upon executors and others who hold recognized fiduciary positions.[10]

Lastly, the provisions of the Act do not affect or alter the *periods* specially prescribed for any suits by special[1] (and local) laws. It has been held by the Calcutta High Court that the general provisions and exceptions relating to the computation of the periods of limitation do apply even to such suits.[2]

It may be here observed that the general exception as to "legal disabilities" does not apply to suits to enforce the right of pre-emption (sec. 7), and that the exception as to "death before right to sue accrues"

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[8] Kylasa *v.* Ramasomi, I. L. R., 4 Mad., 172; Vithal *v.* Vithojirov, I. L. R., 6 Bomb., 586. For *other* cases, see I. L. R., 6 Calc., 60; I. L. R., 8 Calc., 420; and I. L. R., 7 Bomb., 322.

[9] Sec. 10; Balwant Rao *v.* Puran Mal, 13 C. L. R., 39, P. C.

[10] Gireender *v.* Mackintosh, I. L. R., 4 Calc., 897.

[1] Such as the Law of Landlord and Tenant, the Registration Act, &c., &c. Sec. 6.

[2] See Lecture VII, pp. 215-6; and Second Appeal, No. 1204 of 1882, decided by the Calcutta High Court on the 20th December 1883. The same remark applies to appeals and applications under special or local laws.

(sec. 17) does not apply to such suits, nor to suits for possession of immoveable property or hereditary offices.

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Having briefly reviewed the *operation* of Act XV in respect of time, place, persons and subjects, we shall next consider the rules and exceptions (as to the limitation of suits) enacted by that law.

Rules and exceptions.

First general rule. Subject to the exceptions and provisoes mentioned below, *every suit instituted after the prescribed period of limitation shall be dismissed, although limitation has not been set up as a defence.*[3]

First rule, explanation and proviso. secs. 4 & 22.

By a *subsidiary* rule it is explained, that an ordinary suit is instituted when the plaint is presented to the proper officer of the Court; and a suit *in formâ pauperis*, when the application for leave to sue as a pauper is filed.[4] And it is *provided* that, when, after the institution of a suit, a *new* plaintiff or defendant is substituted or added, the suit shall, as regards the new plaintiff or defendant, be deemed to have been instituted when he was so made a party.[5]

Second general rule. As the complement of the rule[6] that the words 'year' and 'month' in the *Act*,

Second rule, complement, and proviso.

[3] Sec. 4. See Lecture IV, pp. 91, 100.

The first general rule applies to suits, appeals and applications. But para. 2 of sec. 5 allows *appeals*, and applications for *reviews* to be admitted even *after* the prescribed period for any sufficient cause of delay.

[4] See explanation to sec. 4, which further provides that, in the case of a claim against a company which is being wound up by the Court, the suit is deemed to be instituted when the claimant first sends in his claim to the official liquidator. As to applications for leave to sue as a pauper being registered as a plaint, see sec. 410, Act XIV of 1882.

[5] Sec. 22. The legal representative of a deceased plaintiff or defendant when the suit as instituted is continued by or against such representative, is not a *new* plaintiff or defendant within the meaning of this proviso.

[6] See the General Clauses Act, 1868. The second rule, also, applies to appeals and applications as well as to suits.

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respectively mean a year and month reckoned according to the British calendar (which, since the 2nd September 1752, is the same as the Gregorian calendar), it is enacted by sec. 25, that *all 'instruments' shall, for purposes of limitation, be deemed to be made with reference to the Gregorian calendar.*

Sec. 25, Act I of 1868, and art. 85, sched. ii.

So that, 'year' and 'month' in the Act, as well as in contracts, wills and other instruments bearing native or non-English dates, shall be construed in the sense which they bear in the English calendar. When, for instance, the date of a contract and the date when it is to be performed are dates of the Bengal or Fussily year, the corresponding dates of the English year should be taken, and the period of limitation calculated from such English dates according to the Gregorian calendar.[7]

*Provided* that, in a suit for the balance due on a mutual, open and current account, where the period of limitation runs from the close of the 'year' in which the last item admitted or proved is entered in the account, if any era *other* than the English era is used in the said account, the 'year' is to be computed as in the account.[8]

Third rule, sec. 12.

Third general rule. Inasmuch as fractions of a day are not recognized (except where it becomes essential for the purposes of justice to ascertain the exact hour or minute), the day of the accrual of the cause of action must be either included or excluded

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[7] Nilkanth *v.* Dattatraya, I. L. R., 4 Bomb., 103; Almas Banu *v.* Mahomed Raja, 6 C. L. R., 553.

[8] Art. 85, sched. ii. See also Maharajah Jay Mungal *v.* Lal Rung Pal, 4 B. L. R., App., 53; 13 W. R., 183.

in its entirety.[9] The Act adopts the latter alternative, and lays down that, *in computing the prescribed period of limitation, the day from which such period is to be reckoned shall be excluded.*[10]

Fourth rule, sec. 9.

Fourth general rule. *When once the period of limitation has commenced to run in any case, it will not cease to do so by reason of any subsequent disability or inability*[1] *to sue* (*although such disability or inability may be within the saving of the Act*). (*Sec.* 9.)

Sec. 9 explained and illustrated.

The minority, insanity or idiocy of the plaintiff will not stop the running of time, if the cause of action accrued, or rather if the event from which limitation starts occurred, while he or the person through whom he claims was under no such disability. The previous non-existence of the person now entitled to sue or liable to be sued, does not exempt him from the operation of limitation, if, *at the time* when the cause of action arose, there was a person in existence capable of instituting the suit, and another against whom the suit might have been instituted.[2]

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[9] Banning, p. 254. See the judgment of Denman, J., in Migotti *v.* Colvill, 4 L. R., C. P. Div., 233.

[10] Sec. 12, para. 1. In *excluding* the time of the continuance of an injunction or order by which the institution of a suit has been stayed, the first day, *viz.* the day of the order, *is included.* (Sec. 15.) The 3rd rule, like the first and second, applies to appeals and applications as well as to suits. The other paras. of sec. 12 allow exclusion of additional time in case of appeals and certain applications.

The third general rule refers to the *first* day of the period of limitation, and the first general exception (sec. 5) to the *last* day of that period.

[1] Disability is want of a legal qualification to act. Inability is want of a physical power to act.

[2] The *express language* of secs. 7 and 17 renders it necessary that the *disability* and *inability to sue* mentioned in those sections must exist at the time when limitation (ordinarily) commences to run. So far as these sections are concerned, the rule in sec. 9 is therefore unnecessary. Indeed, as observed by Sir James Colvile, in the Statement of Objects

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Inability to sue by reason of want of funds, or by reason of the Courts being closed during the *beginning* of the period of limitation, is not a ground of exemption or extension recognized by the Act. And as no equitable construction can be put upon the Act, such inability, though existing at the time of the accrual of the right to sue, does not prevent the operation of limitation. And the same remark applies to the non-existence of a particular person at the time when the period of limitation commenced to run against some *other* person in existence, and then entitled to bring the suit, as in the case of a suit to set side an adoption (under art. 129 of Act IX of 1871) instituted by a sister's son of the adoptive father, where the sister's son was born after the adoption.[3]

The first part of sec. 9 is not an enabling enactment. It does not say that any disability or inability to sue existing at the time when the cause of action accrues *shall entitle* the plaintiff to an extension of time, but only that any subsequent disability or inability *shall not entitle* him to such an indulgence. The Indian Legislature does *not* (as some text-book writers do)[4]

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and Reasons appended to his Limitation Bill of 1855, the English and American rule that when the Law of Limitation has once begun to run, nothing shall stop it, "seems to depend more on the language of the statutes than on any sound principle."

But the framers of the Acts of 1871 and 1877 emphasize the rule by giving it an independent force. The rule will probably operate in cases of concealed fraud under sec. 18. If no fraud is practised on the person entiled to sue, and limitation commences to run, it will not cease to run by reason of any subsequent fraud against his successor.

[3] See Siddheshur Dutt *v.* Sham Chand, 23 W. R., 285. The altered language of art. 118, Act XV of 1877, removes this difficulty.

[4] Banning on Limitation, pp. 6, 227, 234, 253. Chief Justice Hornblower, in an American case, says, that where the Statute of Limitations has

lay down that no subsequent *event* shall stop the running of time, but simply that no subsequent *disability* or *inability to sue* shall have that effect.

A defendant not residing within the limits of British India may (in many cases at least) be easily sued in the Courts of British India. The defendant's *absence* from British India is not a 'disability' within the meaning of secs. 7 and 9, and is not an "inability to sue" within the purview of the latter section.[5] Nor are the terms applicable to written *acknowledgments* and *payments* made by the defendant or his agent. Nevertheless, in these and other cases,[6] the

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commenced running, "it runs over all subsequent disabilities and intermediate acts and events." See Angell, sec 477, note. Mr. Banning mentions three exceptions to this rule: (1) where debtor is administrator of creditor; (2) where an abated suit is revived against the representative of a deceased defendant; (3) where the Crown is assignee of an unbarred debt. The first exception is recognized by the proviso to sec. 9. The second exception is rendered unnecessary by the express provision of art. 171c (see Act XII of 1879, sec. 108). The third exception will probably be recognized by our Courts.

[5] See Beake & Co. *v.* Davis, I. L. R., 4 All., 530, where the ruling in the case of Narranji *v.* Mugniram (I. L. R., 6 Bomb., 103) was dissented from, and it was held that the time of defendant's absence from British India, whether *subsequent* to the accrual of the cause of action *or not*, is to be excluded in favor of the plaintiff under sec. 13 of the Act. It may be observed that the rule was exactly the same under Act XIV of 1859 (see Thompson, 2nd Ed., p. 284), and is the same under sec. 27 of the New York Revised Statutes, Vol. II, part iii, ch. 4, tit. 2, from which the Indian Legislature has borrowed the provisions of sec. 15 of the Act. See Angell, Appendix, lxiii. In the case of subsequent absence (according to the theory of the Act) time *runs* as usual, but the period of absence is not *deemed* a portion of the time prescribed by sched. ii.

Prevention, suspension, and interruption of the operation of limitation, explained

[6] The rule as to the continuance of the running of time being dependent on the continuance in force of the enactment under which time has been running, if before the prescribed period has expired, the statutory pressure be removed by the total repeal of the Act, the operation of limitation is suspended or rather stopped unless the Legislature re-enact the old law. If a *new* rule of limitation be enacted before the action is barred by the old law, the running of time may be interrupted by the

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and illustrated. new rule. See Abdul Karim *v.* Manji, I. L. R., 1 Bomb., 295, 303. There are several cases of actual or virtual suspension of limitation. (For six of these cases, see sec. 9, proviso, and secs. 13 to 16, and the Table.)

Under Act XIV of 1859 it was held, that estoppels *in pais* and compromises in some cases had the effect of suspending or preventing the operation of limitation. (See *ante*, pp. 95, 105.) Where a debt is made payable by instalments, with a proviso that, on default of payment of any one instalment, the whole debt, or so much of it as may then remain unpaid, shall become due, limitation runs from the time of the first default. But if the plaintiff *waives* the benefit of the proviso by a subsequent act, such waiver practically *suspends* or rather *interrupts* the running of time. (See art. 75, Act XV; Cheni Bash *v.* Kadum, I L. R., 5 Calc., 97.) Articles 179 and 180, relating to the execution of decrees, offer other instances in which the running of time is practically interrupted by an application, a notice, revivor, &c., &c. Suspension or interruption occasioned by the repeal of old laws, and interruption caused by waiver or by applications, &c., in execution, are not referred to in the Table.

Limitation is practically suspended when certain durations of time are allowed to be deducted in the computation of the period. Limitation is practically interrupted when a fresh period is allowed after it has run for some time.

According to the *language* of the Act, in the case of the legal disability of the plaintiff, limitation *does not (begin to) run* against him. In the case of the administration of a creditor's estate by his debtor, the *running of time is suspended* by the administration. In the case of defendant's absence, and some other cases mentioned in secs. 14, 15 and 16, the plaintiff is entitled to the *exclusion of certain periods in the computation* of the time of limitation,—that is, such periods are not deemed to be any portions of the prescribed time. (In these cases, the running of time is *virtually* 'suspended.') In the case of death *before* the right to sue accrues, or of concealed fraud, the period of limitation is to be *computed from a later date* than the date of the actual cause of action. The running of time is here virtually prevented by the operation of limitation being postponed to the date of the statutable cause of action. In the case of an acknowledgment or payment, *a new period of limitation is to be computed* from the date of such acknowledgment or payment. *Practically*, previous death and concealed fraud "prevent the running of time," and acknowledgments and payments "interrupt the running of time." But in all the excepted cases, save those of legal disability and debtor's administration of the creditor's estate (secs. 7, 8 and 9), according to the theory and language of the Act, limitation *runs* as usual,

accrual of the right to sue. The only case in which a *subsequent disability* or *inability* to sue suspends the running of time is a case where there is the same hand to give and receive. The proviso to sec. 9 is as follows :—*Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.*

Proviso to the 4th rule explained.

Here the Act *expressly* says that the running of time shall be *suspended* by a specified subsequent event. But there are five other events mentioned in Part III (see secs. 13, 14, 15 and 16, and the Table appended to this Lecture) which *virtually* suspend the operation of limitation, cause a break in the period, and give the plaintiff an *extended* time. These five cases are not referred to in the proviso, either because they are not cases of disability or inability to sue within the meaning of the rule in sec. 9, or because they are treated as cases in which limitation, theoretically, continues to run, though certain periods during which it so runs are not *deemed* to be any portions of the prescribed time of limitation. For obvious reasons suspension, which may be caused by a *total repeal* of the law, is, also, not mentioned.

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though under the express provisions of the Act, the period of limitation is extended, by the operation of limitation being *practically* 'suspended,' as shown above, or 'prevented' by the introduction of a statutable cause of action, or 'interrupted' by the renewal of the period of limitation. Cessation of legal disability (under secs. 7 and 8) is a statutable cause of action like that provided for by sec. 17 or sec. 18, but it is only in cases under secs. 7 and 8 that, in the *language* of the Act, *time does not run* from the ordinary starting point, as it is only in cases under the proviso to sec. 9 that the *running of time is suspended* by a subsequent event.

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The proviso to sec. 9 refers to the case of a debtor obtaining letters of *administration* to his *creditor's estate* either before or after limitation has commenced to run. Cases where a debtor becomes the *executor* of his creditor, and a *creditor or legatee* becomes the executor or administrator of his *debtor's or testator's estate*, are not mentioned.

The grant of letters of administration, not being an act of the parties, operates as a *suspension* of the remedy. But where a creditor appoints his debtor an executor, and the executorship is accepted, this being an act of the parties, the debt is *extinguished* on the supposition of its being paid by the executor to himself, and thus becoming assets in his hands for which he is accountable.[7] This is probably the reason why the proviso does not extend to the case of the debtor becoming *executor* to his creditor. In the *converse* case of a creditor or legatee becoming the executor or administrator of the debtor or testator, the creditor or legatee may pay himself out of the assets which he has to administer. He cannot (and is not obliged to) bring any suit for the purpose of making *himself* pay the debt or legacy.[8]

The fourth rule applies to suits as well as to applications.[9] Two other rules (relating to the starting

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[7] Brown, p. 468; Banning, 226, 227.

Sec. 87 of the Indian Trusts Act, No. II of 1882 (which does not extend to Bengal and Bombay), enacts as follows:—"Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein."

[8] See Binns *v.* Nichols, 2 Eq., 256; and Banning, p. 226.

[9] The term "to sue" is not defined in the Act. "Inability to sue" includes "inability to apply." See Shumbhoo *v.* Guru Churn, 6 C. L. R., 437.

point of limitation in certain cases) are given in secs. 23 and 24. LECTURE VIII.

Fifth rule. *Where there has been a continuing*[10] *breach of contract or a continuing wrong (independent of contract) a new period of limitation begins to run at every moment of the time during which the breach or the wrong continues.* (*Sec.* 23.) Fifth rule. Sec. 23, and arts. 19, 23, 42, 115 and 116.

It is, however, provided by arts. 115 and 116, sched. ii, that, in a suit for compensation, in the case of a continuing breach of contract, the time when the breach *ceases* is the time when the period of limitation begins to run. Articles 19, 23 and 42 in the same way provide that, in certain cases of continuing wrong, limitation runs from the time when the wrong *ceases*. So far as the bar of limitation is concerned, there is *practically* this difference between these provisions and the rule in sec. 23, that, according to the language of these articles, the defendant, in a suit for compensation for false imprisonment (art. 19), or for the other wrongs or breaches (arts. 23, 42, 115 and 116), cannot divide the time of the continuance, and plead limitation to so much of the wrong or breach as took place more than the prescribed number of years from the time of the institution of the suit.[1] But in cases of continuing breaches and wrongs, not covered by these special provisions, such a course may be open to the defendant.

Sixth rule. *In the case of a suit for compensation* Sixth rule. Sec. 24,

[10] See pp. 219, 222, *ante*, for an explanation of this term.

[1] In a case of false imprisonment, he may do so in England (see 12 East, 67; and Darby and Bosanquet, p. 30), and under sec. 23 he might do so in British India, if the provisions of that section were not controlled by art. 19.

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and art. 25.

*for an act which is not actionable in itself, without some (special damage or) specific injury caused thereby, the period of limitation shall be computed from the time when the (damage or) injury is caused.* (*Sec.* 24.)

Article 25 expressly enacts that, in a suit for slander, if the words are not *per se* actionable, the period of limitation runs from the time when the special damage complained of results. This express provision would seem to be unnecessary (in view of the rule laid down in sec. 24), except where more than one specific injury is caused by the slander, and the plaintiff complains of the later injury.[2]

The fifth and sixth rules may be treated as *provisoes* or *exceptions* to the ordinary rule, that limitation commences to run from the date of the act or omission complained of, and they have been so treated in the Table at the end of this Lecture.

Exceptions to the application of the periods of limitation.

In this Lecture, we have already noticed all the sections[3] of Parts I, II and III, except sec. 3 (which is an interpretation clause) and the sections which relate to exceptions[4] founded on special grounds,

[2] The plaintiff may be in time from the date when the special damage *complained of* results, though out of time from the date of the earlier injury or damage.

[3] Secs. 1, 2, 6, 10 and 11 relate to the *operation* of Act XV of 1877.

Secs. 23 and 24 and sched. ii, col. 3, relate to the *starting point* of limitation.

Sched. ii. col. 2, relates to the *periods* of limitation.

Secs. 4, 22, 25, 12, 9 (and secs. 23 and 24 also) relate to (general) *rules.* Sec. 3 relates to interpretation.

The other sections (of Parts II and III), *viz.*, secs. 5, 7 and 8, proviso to sec. 9, and secs. 13-21, relate to (general) *exceptions.*

[4] These are exceptions to the two most important general rules, *viz.* the first and the fourth.

such as the closing of the Courts on the last day of the period of limitation, the legal disability of the plaintiff, the absence of the defendant from British India, *bonâ fide* proceeding in a wrong Court, temporary injunction staying the commencement of suit, death before right to sue accrues, concealed fraud, acknowledgments, and payments.

The appended Table gives a general view of these as well as other exceptions.

# LECTURE IX.

## THE EXCEPTIONS. LEGAL DISABILITY.

Important exceptions. Secs. 5, 7, 13, 14, 18, 19 & 20 — Reasons for these exceptions — Legal disability of plaintiff — Minority — The Majority Act — The previous state of the law of minority and majority — Foreign laws — Insanity and idiocy — Co-existing and successive disabilities — Subsequent birth or adoption of claimant — Disability of defendants no ground of exemption — Sec. 7, Act XV, applies to suits and applications — Disability at the time from which the period of limitation is to be reckoned — Inconvenience of this rule — Arts. 44 & 94 — Cessation of disability or death under disability, a statutable cause of action — Proceedings during the period of disability — Disability confers a *personal* privilege — Assignees not entitled to the privilege — Hard cases under the existing law — To whom is cessation of disability, or death under disability, a cause of action — The law allows the maximum period of 3 years from the statutable cause of action, or the full period from the ordinary starting point of limitation — No fixed limit to the indefinite extension of time under sec. 7 — An exception to the exception — Disability of one of several joint claimants.

Important exceptions. Secs. 5, 7, 13, 14, 18, 19 & 20.

Of the exceptional circumstances which directly extend the period of limitation, or which indirectly do so[5] by preventing, suspending or interrupting

[5] Where the existence of the exceptional circumstance does *not* give the plaintiff a *longer* time, the section relating to the exception is not applied. Thus, if plaintiff is dispossessed of a taluk when he is 13 years old, and he attains his majority 5 years after, he may sue to recover the taluk within 12 years from the date of his dispossession (*i.e.*, until he is 25 years old), and section 7 of Act XV of 1877, which gives him only 3 years from the time of attaining his majority, will not apply. The plaintiff need not avail himself of the provisions of that section, and the defendant cannot compel him to do so. (Kaleedoss *v.* Behari, 2 W. R., 305; Radhamohun *v.* Mohesh, 7 W. R., 4.) The same remark applies to the cases referred to in Illustrations (e) and (f) appended to section 7. Similarly payment of interest on money lent, when the principal is not yet due, will not prevent the creditor from suing within the ordinary period reckoned from the due date. It is *only* in cases like these that the

the running of time, the following seven[6] may be considered the most important:

1. The fact that the *court is closed* (whether on authorized holidays or on working days)[7] during the latter end of the prescribed period of limitation. Here the period is *directly* extended to the day when the court reopens. Section 5.

2. The legal *disability* (minority, insanity, idiocy) of the plaintiff. Here the operation of limitation is *prevented* by the continued existence of the disability. Sections 7 and 8.

3. *Absence of the defendant* from British India. Here the operation of limitation is practically *suspended* so long as the defendant is absent. Section 13.

4. Abortive *bonâ fide proceeding* by the plaintiff against the defendant in a court which has no jurisdiction. Here also the operation of limitation is practically *suspended* so long as the proceeding continues. Section 14.

5. *Fraudulent concealment* by defendant, of plaintiff's right to sue, &c. Here the operation of limitation is *prevented* by the fraud, and postponed to the discovery of the fraud. Section 18.

6. Written *acknowledgment* of liability by a defendant or his agent. Here the operation of limitation is *interrupted* by the acknowledgment, and

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ordinary period prescribed by the Act is *not extended*, by the existence of the exceptional circumstance.

The exception as to express *trustees is a total* exemption from the operation of limitation.

[6] Five of these (*viz.* 2 to 6) were the only general exceptions which, with certain restrictions, were recognized by Act XIV of 1859.

[7] Bishen *v.* Ahmed, I. L. R., 1 All., 263. The old law and the cases thereon are referred to in a note at p. 265, *ibid.*

LECTURE IX. time runs again from the date of the acknowledgment. Sections 19 and 21.

7. *Payments of interest* or *part payments* by the defendant or his agent. Here also the payments *interrupt* limitation, and give the plaintiff a fresh period. Sections 20 and 21.

Exception (1) applies to the limitation of suits, appeals and applications.

Exceptions (2), (4), (5), (6) and perhaps[8] (7) apply to the limitation of suits, as well as of applications. Exception (3) applies to the limitation of suits[9] only.

Reasons for these exceptions.

The first of these grounds of extension is based on an act which proceeds from *neither of the parties* to the case, and which occurs at a time to which a recourse to law is very often deferred, namely, the latter *end* of the period of limitation.

The second exception is founded on the *involuntary disability of the plaintiff* (the party who has to initiate the proceedings), at the time when limitation ordinarily *commences* to run.

The third ground of extending the period of limitation is based on the absence from British India of the *defendant* (the party to be sued), whether such absence is *voluntary or involuntary*, and whether it

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[8] See Ramhit *v.* Satgar, I. L. R., 3 All., 247, where the correctness of the ruling in Kally Prosonno *v.* Heeralall, I. L. R., 2 Calc., 468, was doubted by Stuart, C. J., who was inclined to hold that part payments of *judgment* debts, after decree, would give a fresh start, as regards *applications* for execution. See Lecture XI.

[9] In all these exceptions, save that relating to defendant's *absence*, 'plaintiff' includes 'applicant,' and 'defendant' includes "the party *opposed* to the applicant." In the exception relating to the Court being closed, 'plaintiff' includes 'appellant' also.

occurs in the beginning[10] or *any* other part of the period of limitation.

The fourth, fifth, sixth, and seventh grounds of extension are based on certain *voluntary acts* of one of the *parties*;—the fourth, on acts of the *plaintiff*, positively shewing his diligence; the fifth, on acts of the *defendant*, which prevent the plaintiff from proceeding against him; and the sixth and seventh, on acts of the *defendant*, which remove the obliterating effects of the time that has already elapsed, by shewing, directly or indirectly, that his liability still exists.

In these and other cases, the time of limitation is virtually enlarged, because, under the circumstances, the plaintiff is not considered guilty of *laches* in not enforcing his right within the specified period, or because the conduct of the defendant renders it unnecessary to exact the penalty attached to the lapse of time.

But as the maxim *cessante ratione legis, cessat et ipsa lex* (the reason of the law ceasing, the law also ceases), and arguments founded on analogy, are inapplicable[1] to positive enactments of the Legislature, too much stress should not be laid on the *reason* of the law. The exceptions recognized by the Legislature are founded on its own ideas of expediency, that is, on what it considers expedient upon the balance of convenience and inconvenience.

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[10] Narainjee *v.* Mugniram, I. L. R., 6 Bomb., 103, in which it was ruled that the *subsequent* absence of the defendant is no ground of extension, has been dissented from in Beake *v.* Davis, I. L. R., 4 All., 530. See Lecture VIII, p. 237.

[1] See Lecture VII, pp. 182, 196, *supra*.

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The Judge and the lawyer, arguing analogically from the reason of the law, cannot engraft a *new* exception upon the rule, or refuse to apply an exception to a case which is within the *plain* meaning of the words in which it has been enacted.

These seven exceptions (together with others mentioned in the Table) will be considered again in the notes under the several sections of the Act. In this and the following two lectures, we shall confine our attention to the three exceptions in respect of legal disability, acknowledgments, and payments.

Legal disability of plaintiff.

Under Act XIV of 1859, the following persons were deemed to be under legal disability:—Married women in cases governed by English law, minors, idiots, and lunatics. Coverture was not deemed a legal disability under the Regulations, nor is it deemed such under the later Acts of 1871 and 1877. The identity of interests between husband and wife, even where the English law is applicable, would, in the opinion of the Legislature, be sufficient to secure attention to her claims against third parties.[2] And where the interests of the *feme covert* are in opposition to the claims of the husband, she may sue by her next friend.

The minority, insanity, and idiocy of plaintiff are the only grounds of legal disability that are now recognized by the Law of Limitation in British India. The disability of alien enemies under sec. 430 of the Civil Procedure Code is not a disability

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[2] See Reports of the Indian Law Commissioners for 1843-1844. In 1859, the Legislature was of a different opinion. In 1871 and 1877, the Legislature agreed with the Commissioners.

within the meaning of the exception in sec. 7, Act XV of 1877. The existence of a dispute as to the plaintiff's title, and the pendency of a suit respecting it, do not constitute a legal disability.[3] Nor is plaintiff's absence from British India, or his imprisonment or transportation, a ground of disability under sec. 7.

Minority.

In Act IX of 1871 'minor' meant a person who had not completed his age of eighteen years. Act XV of 1877 omits this definition, because a definition is (in the generality of cases) supplied by the Indian Majority Act (IX of 1875). In a question of minority or majority arising upon the issue of limitation under Act IX of 1871, there was no distinction between persons domiciled in British India, and persons who were not so domiciled.[4] But now, the question, when a foreigner not domiciled in British India attains his majority, is left undetermined[5] by Act XV of 1877, or Act IX of 1875.

The Majority Act.

The Indian Majority Act, which came into force on the 3rd June 1875, enacts the two following rules:[6]—

(*a*) Every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the juris-

[3] Muddun Mohun *v.* Nund Kishore, 5 W. R., 295. See also Rajah Saheb Perhlad *v.* Moharajah Rajendro, 12 W. R., P. C., 6. See further, pp. 235–240.

[4] Rainey *v.* Nobocoomar, 5 C. L. R., 543.

[5] Justice Markby decided this question in Roelo *v.* Smith (1 B. L. R., O. C., 10), but Jackson, J., was not satisfied as to the correctness of that decision. See Rainey *v.* Nobocoomar, 5 C. L. R., 543. In the absence of a definition in Act XIV of 1859, the term 'minor' was construed according to the law of the party in each case. Hari *v.* Vasudev, 2 Bomb., 344.

[6] Section 3, Act IX of 1875.

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diction of any Court of Wards, shall be deemed to have attained his majority when he shall have completed his age of *twenty-one* years, and not before.

A guardian *ad litem* is not a guardian within the meaning of this rule.[7] The guardian must be actually appointed (by the *issue*[8] of a certificate under Act XL of 1858 or Act XX of 1864 or by a similar proceeding), or the Court of Wards must actually assume the management[9] of the minor's estate, *before* he completes his eighteenth year. Otherwise, rule (*b*) applies.

(*b*) Every *other* person (whether a native or a foreigner) *domiciled* in British India, shall be deemed to have attained his majority when he shall have completed his age of *eighteen* years, and not before.

So far as the capacity to sue[10] is concerned, a minor attains majority under rule (*a*), at the beginning of the 21st anniversary of his birth-day, and under rule (*b*), at the beginning of the 18th anniversary of that day.[1]

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[7] Section 443, Civil Procedure Code.

[8] Stephen *v.* Stephen, I. L. R., 9 Calc., 901. Application for a certificate, or a mere order granting a certificate, is not sufficient.

[9] Periyasami *v.* Seshadri, I. L. R., 3 Mad., 11.

[10] Section 2, Act IX of 1875, enacts a *proviso*, so far as the capacity to act in certain *non-judicial* matters is concerned. Puyikuth *v.* Kairshirupokil, I. L. R., 3 Mad., 248.

[1] Section 4, Act IX of 1875.

It may be mentioned here, that Act IX of 1875 extends to the whole of British India, and, so far as regards *subjects* of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty. The Act was passed with the object of prolonging the period of nonage and of attaining greater uniformity and certainty respecting the age of majority.

The previous state of

The previous state of the law was anything but satisfactory. Mahomedans attained their majority at the age of sixteen unless symptoms of puberty appeared at an earlier age. (Abdool *v.* Musst. Elias, 8 W. R., 301,

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Foreign laws.

"Twenty-one is the full age by the laws of England, Spain, and of the United States of America, and also by the law which now prevails in France, Belgium, and Holland; but in the three countries last mentioned, a minor is emancipated and obtains majority at once by marriage; or, if he has completed his fifteenth year, by a judicial declaration of the father, or, if the father be dead, of the mother."[2]

Insanity and idiocy.

The term 'lunacy' (see sec. 12, Act XIV of 1859) has acquired an extent of meaning equal

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the law of minority and majority.

but see Agra Sud. Rep. for 1857, p. 21.) Hindus, according to the Bengal school, attained majority at the end of fifteen years, and according to the Mitakshara school, on the completion of the sixteenth year. (Cal. Sud. Dewany Reports for 1853, p. 505; 2 Bomb., 325.) In the mofussil, sec. 2, Beng. Reg. XXVI of 1793, extended the period of minority of *proprietors of estates paying revenue to Government* to the end of the 18th year, whether they were Hindus or Mahomedans, males or females, in possession or out of possession, in respect of all acts done by such proprietors, both as to matters connected with real estate, and matters of personal contract. (Bykunt *v.* Pogose, 5 W. R., 2; Ranee Roshun *v.* Raja Enayet, 5 W. R., 4.) Act XL of 1858 similarly extended the period in the case of *all* persons in the mofussil of the Bengal Presidency, not being European British subjects, whether certificates had been taken out under the Act or not. (Modhusudun *v.* Debi Govinda, 10 W. R., F. B., 36.) A different construction was put upon the corresponding Bombay Act (XX of 1864), and it was held that the limit of 18 years was not applicable to any person until the Act was brought into play by the exercise of the jurisdiction of the Court. (Shivji *v.* Datu, 12 Bomb., 281.) Hindus and Mahomedans and others, domiciled in Calcutta and subject to the jurisdiction of the Supreme Court or the Original Side of the High Court, were not affected by Reg. XXVI of 1793 or Act XL of 1858. (Mothoor Mohun *v.* Coomar Surendro, 24 W. R., 464, F.B.; Kally Churn *v.* Bhuggobutty Churn, 19 W. R., 210, F. B.) But in Rajcoomar Roy *v.* Alfuruddin, 8 C. L. R., 419, in which the Full Bench decision in the 24 W. R. was not referred to, it was held by a single Judge, that if a resident of Calcutta had property in the mofussil, the age of his majority might be extended by the provisions of Act XL of 1858, at least, if the cause of action occurred, and the suit was brought, in the mofussil.

[2] Macpherson's Civil Procedure Code, 5th Ed., p. 67.

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to that of the generic term 'insanity,' though it was formerly used to denote periodical insanity only.[3]

An idiot is a person who, by a perpetual infirmity from his birth, has been without understanding. A man who is deaf and dumb from his birth is not necessarily an idiot, though this may be the legal presumption. Insanity is not congenital, it is caused by sickness, grief or other accident.

Insanity or unsoundness of mind is a ground of exemption, whether there has been a commission of lunacy, or committeeship, or any analogous measure or not.[4] Under Acts XXXIV and XXXV of 1858, a person is a lunatic when he is incapable of managing his affairs by reason of unsoundness of mind.[5] And 'unsound mind' comprehends imbecility, whether congenital or arising from old age, as well as mental alienation resulting from disease.[6] A temporary loss of memory and understanding arising from accidental and temporary causes, or mere weakness of intellect, does not constitute insanity or unsoundness of mind.[7] If the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, such a mind is not really sound on other subjects.[8] In the case of lunacy, the ordinary presumption is, that those who are thus unfortunately visited never entirely recover

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[3] Webster.

[4] Troup *v.* E. I. Co.; Dyce Sombre *v.* E. I. Co., 4 W. R., P. C., 111. But a lunatic is not obliged to sue by his next friend unless he is *adjudged* to be so. Sec. 463, Civil Procedure Code.

[5] Mr. G. Sherman *v.* E. Sherman, 24 W. R., 124.

[6] Brown, p. 549. [7] *In re* Cowasji, I. L. R., 7 Bomb., 15.

[8] See Waring *v.* Waring, 6 M. P. C. C., 341, cited at p. 549 of Brown on Limitation.

their mental faculties. Where the fact of lunacy is proved generally, a lucid interval is not presumed, but the sanity and legal competency of the party must be clearly proved. A mere diminution or remission of the complaint is not sufficient.[9] So far as I know, it has not been decided in any reported Indian case that the occurrence of a lucid interval shall be deemed to be a cessation of disability within the meaning of the Exception.

Co-existing and successive disabilities.

Act XIV of 1859 did not expressly provide for double or co-existing disabilities. Act IX of 1871 supplied this defect, but did not provide for supervenient or successive disabilities in the same or different persons.[10] Act XV of 1877 not only extends the time when the plaintiff is under two disabilities, at the time when limitation ordinarily commences to run, but it grants the same privilege, if a second disability supervenes before the cessation of the first. And it does the same, if the person to whom the right to sue first accrued dies before he ceases to be under a disability, and his legal representative labours under the same or another disability. Thus if *A*, the party first entitled to sue, is a minor at the time when the period of limitation begins to run, and insanity supervenes before he attains majority, or if *A* dies a minor, leaving an infant or insane son as his legal representative, limitation

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[9] Angell, sec. 197 (note), where selections from D'Augnesseau, and Sir Wm. Grant's decision in Hall *v.* Warren, 9 Ves., 611, are referred to.

[10] Sookhmoyee *v.* Raghubendro, 24 W. R., 7; Rajah Lall *v.* Delputti, 5 C. L. R., 372, 392. Successive disability in different persons, that is, the disability of representatives, is no ground of extension under 3 and 4 Will. IV, c. 27. See sec. 18.

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does not commence to run either against *A* in the first case, or his son in the second, so long as he or his son is not entirely free from disability; provided, of course, that the disabilities overlap each other, and there is no break between them. If it is not a case of a *continuing* disability from the first, if *A* ceases to be under any disability (even for a day) before he dies, or if his legal representative is not a minor, or insane, or an idiot, *at the time* when he dies, limitation commences to run, and no *subsequent* disability of *A* or his legal representative stops it.[1] Such subsequent disability occurring at *any* time during the ordinary period of limitation, was a ground of extension under the Regulations.[2] But since the Limitation Act of 1859, the law of British India[3] follows the English rule, that time does not run against the person entitled to sue, only if he is under a disability from the very day when the right to sue accrues, or when limitation ordinarily begins to operate.

Subsequent birth or adoption of claimant.

If limitation commences to run against the party who is, at the time, the person entitled to bring the action, even the subsequent birth[4] of a preferable claimant will not give the latter any extension of time on the ground of *his* minority or idiocy.

The subsequent birth of a person (who would be the next owner after the death of a Hindu

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[1] Sreemutty Obhoya *v.* Hurrikristo, 10 W. R., 285.

[2] Dyce Sombre *v.* E. I. Co., 4 W. R., P. C., 111.

[3] See Lecture VIII. p. 235, and Lecture III, p. 63.

[4] The person who claims the benefit of this exception must be in existence at the time when limitation usually begins to run.—Siddhessur *v.* Sham Chand, 23 W. R., 285; Mrinno Moyee *v.* Bhoobun Moyee, 23 W. R., 42, 44.

widow, in case an alienation or an adoption made by her be set aside) does not entitle that person, although he is under a disability, to take advantage of the exception allowed by sec. 7 of Act XV of 1877, and the corresponding provisions of Act XIV of 1859 and Act IX of 1871. Thus, where a Hindu of Bengal dies leaving behind him his mother, a sister, and an uncle's son, and the mother alienates the estate left by him, limitation under art. 125 of Act XV commences to run against the uncle's son; and a son of the sister, born after the alienation, cannot, in a suit to set aside the alienation, claim an extension of time on the ground of his (subsequent) disability, although such disability has existed from the time of his birth. The sister's son, however, will be entitled to bring a suit for possession after the death of the mother under art. 141. The same rule applies to the case of an improper alienation by a Hindu widow, which a son subsequently adopted by her attempts to set aside during the *life* of the widow.[5] Again, where the mother and guardian of a Hindu infant son is *dispossessed* of the family estate, and the infant dying unmarried, the mother succeeds him as his heir, and then adopts a minor son under her deceased husband's permission, limitation begins to operate against the mother from the death of the first minor, and the second minor cannot claim the benefit of the exception, although he has been under a disability from the time of his adoption into the family.[6] If in a similar case, the

[5] Gobind *v.* Ramkanyo, 24 W. R., 183.

[6] Gobind *v.* Hurro Chunder, 7 W. R., 134.

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mother or other guardian improperly *alienates* the estate instead of being dispossessed of it, limitation, it is apprehended, commences to run against the mother from the time when she succeeds the first minor as his heir, and the subsequent adoption of the second minor, and the consequent divestment of her interest, does not stop the running of time. But it has been said that, in such a case, the adopted son occupies the same position as the first ward for whom the guardian acted at the time of the alienation, and that a suit to set aside the alienation is not barred if brought within three years of the second ward's attaining his majority.[7] This dictum is based on the supposition that the principle of art. 44 of Act XV applies to the case, that the cause of action does not arise, and that time does *not commence* to run until the adopted son attains his majority. The alienation, however, not being made by the mother *as the guardian of the second minor*, the suit, *strictly* speaking, is not a suit by a ward "to set aside a sale by *his* guardian" within the meaning of art. 44.

Disability of defendants, no ground of exemption.

It is only when the person *entitled* to sue is under a disability that the law extends the prescribed period of limitation. When the *defendant*, or the party *liable* to be sued, is under a legal disability, no extension is allowed, for there is nothing to prevent the plaintiff from suing such a party. The *absence* of the defendant from British India, though not a legal *disability*, often makes it

[7] See Prosonno *v.* Afzolonissa, I. L. R., 4 Calc., 523. But compare Sookh Moyee *v.* Raghubondro, 24 W. R., 7.

difficult for the plaintiff to prosecute a suit against him, and such absence is recognised, as a ground of extending the ordinary period, by sec. 13, Act XV of 1877.

Sec. 7, Act XV, applies to suits and applications.

Under Acts XIV of 1859 and IX of 1871, the legal disability of the plaintiff was a ground of exemption from the ordinary rule in respect of the limitation of *suits* or *actions*. And it was held that the legal disability of an applicant to make an *application* (*e.g.*, of a decree-holder to make an application for the execution of the decree) was not a ground for extending the prescribed period of limitation.[8]

According to the practice of the Calcutta Sudder Court, decree-holders were allowed the benefit of the exceptions to the ordinary law.[9] The framers of Act XV have adopted the doctrine of the Sudder Court, and expressly extended the exception as to disabilities and several other exceptions to all *applications* to which its provisions apply.[10]

The time for preferring an *appeal* is not extended by the circumstance of the applicant being under a disability.[1]

Disability at the time from which the period of limitation is to be reckoned.

Under Act XIV of 1859 and Act IX of 1871, it was necessary that the person entitled to sue should be under a disability at the time when the *right to sue* first accrued. Under the present law

[8] Rotty *v.* Chunder, 5 W. R.. Misc., 10; Tarruck *v.* Poorno, 8 W. R., 137; 20 W. R., 53; I. L. R., 2 Calc., 336. *But* (as to Act XIV of 1859) see I. L. R., 10 Calc., 748.

[9] See Hyder Ali's case, decided on the 11th January 1851.

[10] See Anatharama *v.* Karuppanan, I. L. R., 4 Mad., 119; and the Table appended to Lecture VIII.

[1] Sheikh Khoda Bux *v.* Budri Narain, 8 C. L. R., 306, 309.

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it is necessary that the disability should exist at the time from which the period of limitation is to be *reckoned*. It has been already observed[2] that this time (*viz.*, the *terminus a quo*) is not necessarily identical with the date of the accrual of the right to sue. Where the starting point of limitation, as fixed by the 3rd column of schedule ii, Act XV of 1877, is *later* than the accrual of the cause of action, no great inconvenience will arise by this change in the law. But in cases where, under the express provisions of schedule ii, limitation starts from a time *anterior* to the date when the plaintiff is first *entitled* to sue, he may not, if he falls into disability in the *interval*, have *any* opportunity of asserting his rights.[3] Section 7 of Act XV will not give him an extension of time, because he was not under any disability at the time from which the period of limitation is to be *reckoned*, though he fell into disability at the time when he first had an actual right to sue. Thus if a person deposits or pawns moveable property with an understanding that he will recover or redeem the same after one year from the date of the deposit or pawn, he may, under art. 145, have *no* opportunity of suing the depositary, or pawnee, if he becomes insane in the course of the year, and is not cured until more than 30 years *after* the date of the deposit or pawn. So again, in a suit by a purchaser of land at a sale in execution of a decree, for possession of the

Inconvenience of this rule.

[2] See Lecture VIII, p. 227, *supra*.

[3] See Owen *v.* De Beauvoir, 16 M. & W., 567, cited in Banning on Limitation, p. 136.

purchased land (when the judgment-debtor was in possession at the date of sale), the plaintiff will have no extension of time, if he becomes insane after the date of the sale, (from which the period of limitation is to be computed), although such insanity overtakes him *before* the sale is *confirmed* under section 316 of the Civil Procedure Code. Until Act XII of 1879 was passed, the title to the property vested in the purchaser from the date of sale, but now it vests from the date of the certificate and confirmation of sale, so far as the decree-holder and the judgment-debtor and persons claiming through or under them are concerned. If a suit for possession, therefore, has to be instituted against persons claiming through or under the judgment-debtor, the purchaser may, under art. 138, have *no* opportunity of asserting his rights, if he becomes insane *after* the *sale*, but *before* its *confirmation*, and is not restored to sanity until more than 12 years have elapsed from the date of sale.

Arts. 44 and 94.

In cases where the period of limitation does not ordinarily commence to run, according to schedule ii, until after a particular disability has ceased, as in suits by wards who have attained majority to set aside sales by their guardians, or suits for property which the plaintiffs have conveyed while insane (see arts. 44 and 94), the provisions of section 7 of Act XV do not apply, unless a second disability overtakes the plaintiffs on or before the dates fixed as the starting points of limitation.

Cessation of disability, or death

The *cessation* of disability (single, double or successive) is a *statutable* cause of action from

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under disability, a statutable cause of action.

which the *person freed from disability* is entitled to compute the prescribed period of limitation. Provided that if such period *exceeds* three years, he is not entitled to the full period, but only to three years from the date of the cessation of disability.

A transferee, creditor, or legal representative of the person *freed* from disability, is not entitled to the privilege conferred by sec. 7. But if the person first entitled to sue *continues* to be under disability up to the time of his *death*, his *death* is, subject to the proviso, a statutable cause of action to his *legal representatives*, even where they themselves are under no disability.

Proceedings during the period of disability.

Minors, idiots, and insane persons are not forbidden to sue (by their next friends) before the cessation of disability. The law does not say that they "may institute the suit or make the application *after the disability has ceased*, within the same period as would otherwise have been allowed," &c., but that "they may institute the suit or make the application *within the same period*, after the disability has ceased, as would otherwise have been allowed," &c. The words "after the disability has ceased" *following*, as they do, the words "within the same period," pretty clearly indicate the real meaning of the Legislature. It cannot be the policy of the law to postpone the trial of claims, and it is unreasonable to hold that a claim which is not barred is to be thrown out because it is asserted too soon rather than too late. The next friend of the person under disability may bring a suit at *any time* during the continuance of the disability,

whether the ordinary period of limitation has already expired or not.[4]

The existence or non-existence of a guardian or committee does not affect the privilege which is conferred on the plaintiff in cases of legal disability.[5] The right to sue is that of the minor, the insane person, or the idiot. He is no doubt bound by any act lawfully done on his behalf by a properly constituted guardian, but if he has a right to sue, and that right has not been exercised on his behalf by his guardian, it exists, and may be exercised by him within a certain time after the cessation of the disability, or on his behalf by his next friend at any time before he is qualified to act for himself.[6]

Disability confers a *personal* privilege.

The provisions of the law in favor of persons under disability are *personal* privileges and exemptions attaching to the *person* only, and not to the property or the title of those who are under disability. The reason why such persons are not subjected to the ordinary rules of limitation is, that the law considers them incapable of forming a proper judgment as to bringing suits or otherwise managing their own affairs.[7] It is only when their disability continues up to the time of their *death*, and they have *no* opportunity of asserting their rights, that their *legal representatives* are allowed

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[4] Musst. Phoolbas *v.* Lalla Jogeshur, 25 W. R., 285, P. C.; (S. C.), I. L. R., 1 Calc., 226; and Banning, p. 83.

[5] See Mahipatrav *v.* Nensuk, 4 Bom., 199.

[6] See Sheikh Khoda Bux *v.* Budri Narain, 8 C. L. R., 306; (S. C.), I. L. R., 7 Calc., 137, and the cases cited therein.

[7] See the judgment of Garth, C. J., in Rudra Kant *v.* Nobokishore, I. L. R., 9 Calc., 663, F. B.

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Assignees not entitled to the privilege.

to claim the special protection afforded by the law.[8] A person who *purchases or otherwise acquires* their right to sue, either *during* the continuance of their disability (in execution of a decree against them or from their guardians), or *after* the cessation of their disability, is not entitled to compute the period of limitation from the *statutable* cause of action, which sec. 7 of Act XV of 1877 gives to the original holders of the right. As against the purchaser or transferee, time runs from the *actual* cause of action or the *ordinary* starting point of limitation.[9] The transfer of the right of a person under disability does not carry with it his personal exemption from the ordinary rule of limitation. In some cases, the purchaser, instead of taking from the person under disability an *absolute* transfer of property not in his possession, may enter into a contract for purchase, to be completed when the property shall have been recovered by suit. If he cannot protect himself in this way, or in any other way, he cannot, as the law stands, expect to enforce

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[8] It would seem that if the person first entitled to sue dies one day *after* the cessation of disability, his son or other legal representative (even when he is himself under disability) cannot claim the exemption granted by sec. 7. The legal representative, in such a case, must bring his suit within the ordinary period from the ordinary starting point of limitation. He cannot have the advantage of the allowance of three years from the cessation of his predecessor's disability.

[9] Mahomed *v.* Eakoob, 24 W. R., 181; and Rudra Kant *v.* Nobokishore, I. L. R., 9 Calc., 663.

Section 11 of Act XIV of 1859 may bear a *different* construction. The language of the section gives the statutable cause of action, and the advantage of the three years' allowance, to the person who labours under disability and to *all* his representatives, whether he *dies* under disability or not. The English law on the subject of the *purchaser's* right to the exemption is not free from doubt. See Banning, p. 136.

his purchased right when it has been barred by the *ordinary* rule of limitation. As the law does *not* say that the *alienation* of the estate of a person under disability shall, so far as that estate is concerned, be *deemed* to be a termination of the disability, to *extend* the exemption to the alienee is to allow him, *without any excuse*, to sleep upon his rights with impunity, so long as the alienor continues to be under (actual) disability, and for three years afterwards.[10]

Hard cases under the existing law.

It is possible that, in some cases of such alienation, the alienee may find himself, on the very date of the alienation, barred by the *ordinary* rule of limitation, and it may perhaps seem rather hard (specially in cases of involuntary alienation) that a right which was enforceable the day *before* the alienation ceases to be enforceable the very next day. Hard cases, it is said, make bad law. But the Judge and the Lawyer should *avoid* this result. They should not put a forced construction[1] upon a law which is expressed in clear and precise terms to avoid what they consider to be a hardship. The same remark applies to other similar cases. If a person to whom a right to sue *has accrued* should die immediately thereafter, leaving a minor son, the ordinary period of limitation might expire during the minority of such son, and he might have no opportunity of asserting a right which his father had not time to assert.[2] So again, if a cause of action

[10] See the judgment of Garth, C. J., in Rudra Kant *v.* Nobokishore, I. L. R., 9 Calc., 663, F. B.

[1] See the judgment of Mitter, J., in the Full Bench case cited above.

[2] Thompson, 2nd Edition, p. 277.

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accrues to a minor, and he dies on the day he attains his majority, his legal representative (whether he is himself a minor or not) might find himself barred by (the ordinary rule of) limitation, from asserting a right which his predecessor, if alive, could have asserted within the time allowed from the date of his majority.

To whom is cessation of disability, or death under disability, a cause of action.

The cessation of disability under Act XIV of 1859 was a statutable cause of action to the person labouring under disability, as well as to his representatives. The action might be brought "by such person or *his representative* within the same time" after the disability had ceased, &c. Under Act XV (as well as under Act IX) the *cessation* of disability is a statutable cause of action to the person who has laboured under the disability, while his *death* (if the disability continues to the time of his death) is a statutable cause of action to his legal representative.[3] If there

[3] Under Act XIV "his representative," under Act IX "his representative in interest after his death" and under Act XV "his legal representative after his death" are, under certain restrictions, entitled to the benefit of the exception. Under sec. 179 of the Indian Succession Act (X of 1865) and sec. 4 of the Probate and Administration Act (V of 1881), the executor or administrator of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. As regards persons governed by the Indian Succession Act, *none* but an executor who has taken out probate, or an administrator who has obtained letters of administration, can be their legal representative.—(*Pogose* v. *Bibee Diskhoon*, 2 C. L. R., 278). As regards Hindus in the Lower Provinces of Bengal, and the towns of Madras and Bombay, if the deceased does not die intestate, his executor or administrator with the will annexed is his *only* legal representative. (Act XXI of 1870.) As regards *other* Hindus, and persons *exempted* from the operation of the Indian Succession Act, the grantee of probate or administration alone is their legal representative if probate or administration has been *applied for and granted* (sec. 82, Act V of 1881); if probate or administration has not been applied for and granted, their heirs

is no break in the continuity of the disability of the person first entitled, and his legal representative is also under disability (single, double or supervening) from the time of his death, the cessation of the disability of such representative is, to him, a statutable cause of action under Act XV. It is not expressly provided that if such disability of the legal representative continues up to *his death*, that *his* legal representative shall have any extension of time under sec. 7.

The law allows the maximum period of 3 years from the statutable cause of action, or the full period from the ordinary starting point of limitation.

Although the cessation of disability or the death of the person under disability is, under the special provisions of the law, a new starting point of limitation, *i.e.*, a statutable cause of action, Act XV does not, as the Regulations did,[4] give the plaintiff, in all cases, the *full* period of limitation from the date thereof.[5] He is entitled to the full period when such period is three years or less. In other cases (*viz.*, in suits under arts. 116—149, and in applications under art. 180 and part of art. 179) he is entitled only to three years from the statutable cause of action. He and all his representatives, however, are in *all*

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or devisees are their legal representatives. (See Greender *v.* Mackintosh, 4 C. L. R., 193, 210.) As to who else may or may not be their legal representatives for the purpose of being sued or proceeded against, see Prossunno *v.* Kristo, I. L. R., 4 Calc., 342 ; Syud Nader *v.* Bishon Chund, 2 Shome's Reports, p. 62 ; Dhoronidhur *v.* Agra Bank, I. L. R., 5 Calc., 86. In sec. 10, Act XV of 1877, the Legislature uses the term 'assigns,' as *opposed* to the term 'legal representatives.'

[4] Kishen *v.* Mudden, 5 W. R., 32, 33.

[5] The *full* ordinary period is allowed where it is either 10, 15, 20 30, 60, or 90 *days ;* or 6 months ; or 1, 2, or 3 years. Where the ordinary period is 6, 12, 30, or 60 *years*, only 3 years are allowed from the *statutable* cause of action under sec. 7. Ten days is the minimum period, and 3 years the maximum period, allowed from the statutable cause of action.

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cases entitled to the *full* period from the *actual* cause of action, or the *ordinary* starting point of limitation. For, sec. 7 is an additional or supplementary provision intended to make a special concession in favor of persons labouring under a disability. Were it otherwise, the disability, instead of being an advantage to them, might, in many cases, turn greatly to their detriment. The person labouring under a disability is not obliged to avail himself of the provisions of sec. 7, unless the three years' allowance from the statutable cause of action gives him a *longer* time than the ordinary period from the ordinary starting point of limitation.[6] Illustrations (*e*) and (*f*) under sec. 7 shew that the intention of the Legislature, in enacting that section, was to give plaintiffs, under certain circumstances, an extension of time, and *not to shorten* the ordinary period in any case.[7] Where the disability ceases after a *short* time, and no extension of time is obtainable[8] under the section, the plaintiff gets the full period from the usual starting point of limitation allowed by the ordinary law.

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[6] Kalee Doss *v.* Behari, 2 W. R., 305 ; Behari *v.* Beni Lal, I. L. R., 3 All., 408, 412. See also Bahur *v.* Sookea, 13 W R., 63 ; Ramanuja *v.* Venkata, 4 Mad., 54 ; Sookhmoyee *v.* Raghubendro, 24 W. R., 7, 8, 10.

[7] See p. 244 (note), *ante*.

[8] Where the ordinary period of limitation is 6, 12, 30, or 60 years, and the three years, allowed from the cessation of disability or the death of the person affected thereby, end *before* the termination of the 6, 12, 30, or 60 years calculated from the ordinary starting point of limitation, sec. 7 of Act XV does not give the plaintiff any extension of time. This question could not arise under the Regulations, as the plaintiff did in *all* cases get the *full* period after the cessation of the disability, where such disability had existed from the time the cause of action accrued ; and where disability supervened after a part of the period had expired, he got the remainder of the full period from the cessation of disability.

If an acknowledgment or payment (under sec. 19 or 20) be made to a creditor who is labouring under a disability, he is entitled to the full period from the date of acknowledgment, and is not confined to three years from the cessation of disability.[9]

No fixed limit to the indefinite extension of time under sec. 7.

As the disability (single or double, or successive in the same person or in different persons) may continue for an indefinite period, the Legislature might have fixed a certain period as the extreme limit after which the existence of disability was to be no excuse for the non-prosecution of claims.

Idiocy or insanity may last for sixty, or even hundred years, and minority in successive persons may continue for upwards of forty years. Possession for forty, sixty or hundred years may, as the law now stands, be disturbed by a person who is entitled to the exemption allowed by sec. 7. To avoid this difficulty, Sir James Colvile, in his Limitation Bill, proposed to fix an extreme limit of 18 years in cases of disability.[10] Under the 3 and 4 Wm. IV, c. 27, sec. 17 (which applies to real property only) the extreme period allowed was forty years, and recently by 37 and 38 Vic., c. 37, sec. 5, this period has been reduced to thirty years from the time when the right to sue first accrued.

An exception to the exception.

In suits to enforce the right of *pre-emption*, the indefinite extension of the period of limitation, where the pre-emptor is labouring under a disability, would greatly increase the evils resulting from

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[9] See Brown, 622.

[10] See secs. 11 and 22 of the amended Limitation and Prescription Bill, 1859.

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such an obnoxious right,[1] specially in the Punjab[2] where the right is not forfeited by reason of the preliminary forms of claim, required by the Mahomedan law, not being gone through. This is why this class of suits has, now for the first time, been excluded from the operation of the exception as to disabilities.[3]

Disability of one of several joint claimants.

Section 8 of Act XV[4] (as well as of Act IX) substantially adopts the following rule laid down by Messrs. Darby and Bosanquet at page 136 of their treatise on the Statutes of Limitation :—

"Where money is payable to several persons jointly, and one or more of them is under any such disability as before mentioned (minority or unsoundness of mind), it is apprehended that if from the fact of such persons being partners or executors or from any other cause, a discharge can be given without the concurrence of the persons under disability, time will run as against all, but otherwise it will not run as against any until all are free from disability."

Section 8, however, is not confined to claims for *money*, and is expressly made applicable to joint

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[1] Raja Ram *v.* Bansi, I. L. R., 1 All., 207.

[2] See the Proceedings of the Legislative Council, 19th February 1871.

[3] Under Act XIV of 1859, it was held in one case that the right of pre-emption could not remain suspended by reason of the plaintiff's disability (Mere Murtoza *v.* Lalla Nursingh, 7 W. R., 86); but this decision was contrary to the language of the Act. (See Jungoo *v.* Alum, 7 W. R., 279, and the decision of the Allahabad High Court in the case cited above.)

[4] For the old law on the subject see Musst. Bolakee Koomaree *v.* Luckhemonee, Calc. Sud. Dew. Reports for 1850, p. 349. It was held in that case, that if one of two co-sharers of a taluk was a minor, that would excuse *his* delay in suing in respect of such taluk.

*claimants* as well as to joint *creditors*. The word 'discharge' in the section is also sufficiently large to include 'release' of any claim.[5] The claim, however, must be a *joint* claim which cannot be enforced by any of the claimants without joining the others. If several persons have a joint cause of action, and, in consequence of any disability of one or more of the joint claimants, it is impossible for the rest to sue, it is but fair that time should not run even against those who are under no disability.[6] But if the legal relation between the joint claimants is such that those of them who are *sui juris* can give a discharge *without* the concurrence of such of them as are *alieni juris*, the provisions of sec. 7 will not apply even to the latter. Where such concurrence is *necessary*, and the defendant cannot be discharged of his obligation during the disability of any of the claimants, even those of the claimants who are under no disability may take advantage of the exception. Besides partners and executors, the members of a joint Hindu family[7] (including the *kurta*) may supply an instance in which one of a number of joint claimants may give a discharge without the concurrence of the others. But it should be observed that one of several partners, executors[8] or members of a joint Hindu family,[9] can-

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[5] See Sweet's Law Dictionary.

[6] Darby and Bosanquet, p. 39.

[7] Surju v. Kwahesh. I. L. R., 4 All., 512.

[8] See sec. 21, Act XV of 1877.

[9] Kumarsami v. Pala, I. L. R., 1 Mad., 385; and Goapl Narain v. Mudoomutty, 14 B. L. R., 21, 49. But see, as to the power of a manager of a Hindu family, Bhola v. Purbhu, I. L. R., 2 Bom., 67, 72. The managing

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not, *as such*, keep alive a liability, as against the others, by an acknowledgment signed, or a payment made, by himself.

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member of a joint Hindu family, it has been recently held, has the same *authority* to acknowledge an unbarred debt as he has to create debts (I. L. R., 5 Mad., 169, F. B.) As an *agent* of the other members, the *kurta* may keep alive a joint liability.

As to whether a managing member has power to bind an infant's estate, see Durgapersad *v.* Keshopersad I. L. R., 8 Calc., 656, P. C.

# LECTURE X.

## ACKNOWLEDGMENTS.

Acknowledgments under sec. 14, Beng. Reg. III of 1793 — Under sec. 4, Act XIV of 1859 — Under sec. 1, cl. 15, and sec. 19 of Act XIV of 1859 — Under Act IX of 1871 — The changes introduced by Act IX — No *promise* to pay, deliver, perform or permit to enjoy is *necessary* in British India — Acknowledgments under Act XV of 1877 — Amendments made by Act XV — 1. Doctrine extended to any property or right — 2. Extended to *applications* — 3. The proviso to the doctrine *extended* to joint contractors and mortgagees — 4. Oral evidence of contents of written acknowledgments *entirely* excluded — 5. Omission of the provision that there must be "an unqualified admission of the liability as subsisting" — Requisites of an acknowledgment — *First*, as to the formalities. The acknowledgment of *liability* must be in *writing*, duly *signed* — What may be proved by oral evidence — Whether sealing is signing — Marking is signing — What amounts to a signature — The signature may appear in *any* part of the writing — Instances of irregular signatures — Agent's signature of his own name sufficient — What acknowledgments should be stamped — What acknowledgments, if any, should be registered — Acknowledgments which are invalid on *other* grounds — *Secondly*, under sec. 19, the acknowledgment must be made *within* the period of limitation — Otherwise, under art. 180, sched. ii — *Thirdly*, what is, in terms, a sufficient acknowledgment — Instances of sufficient and insufficient acknowledgments — The liability acknowledged must be in respect of the *particular* claim of the plaintiff; but the *exact* amount or nature of the liability need not be *specified* — Admission of a *definite* smaller debt — Admission coupled with a conditional promise — Qualified admissions — Advertisement to bring in claims — Requisites of sufficiency — Rights of any kind may be acknowledged under Act XV — *Fourthly*, who must make the acknowledgment — Infants and their guardians cannot — Acknowledgment by executor or administrator of debtor binds his estate — Acknowledgment by a receiver — Acknowledgment by one of several joint debtors, &c. — Where the liability is not apportionable — Acknowledgment by one of several joint mortgagors, administrators, coparceners, or tortfeasors — By one of several joint tenants — Who are agents authorized to make an acknowledgment — Authority need not appear on the face of the writing — Authority to borrow — Authority to adjust accounts — Pleader's authority — Authority of the *kurta* — *Fifthly*, to whom must an acknowledgment (under art. 180) be made — The *effect* of a good acknowledgment — From the date of its being *signed* or *given* — A series of acknowledgments.

THE exception in respect of acknowledgments of liability, by the party against whom a claim is made, has, to some extent or other, been always recognized by the Law of British India.

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Acknowledgments under sec. 14, Beng. Reg. III of 1793.

The first exception to the twelve years' rule of limitation under sec. 14, Reg. III. of 1793 (Bengal Code) was where the plaintiff could shew by clear and positive proof, that he had (within twelve years before the institution of the suit) demanded the *money or matter* in question, and that the defendant had admitted the truth of the demand, or promised to pay the money. A simple acknowledgment of the truth of a demand, *after* the period of limitation had once fully elapsed, was not sufficient.[10] *Demand* by the plaintiff and *admission* by the defendant were *both* necessary to set time running again.[1] The exception was not confined to claims in respect of debts and legacies, but extended to *all matters*. *Oral* admissions, as well as admissions by *agents*,[2] were sufficient. Indirect acknowledgments by *part-payments* were also recognized in some cases.[3]

Under sec. 4, Act XIV of 1859.

Section 4, Act XIV of 1859, shut out inferences and deductions of all sorts,[4] and confined the exception to direct acknowledgments in *writing*, *signed* by the person who was liable to pay the same, distinctly admitting that a *debt* or a *legacy* or a part thereof was due. The signature of an *agent* of the defend-

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[10] Construction, No. 196. The demand and the admission were required to be made within the prescribed period. Gopee Kishen *v.* Binda bun. 12 W. R., P. C., 36. 37.

[1] Macpherson, p. cxciii ; Cal. Sud. Dew. Report for 1855, p. 20.

[2] Macpherson, p. cxciii ; Cal. Sel Rep , Vol. VI, p. 135.

[3] Macpherson, p. cxciii ; Cal. Sud. Dew Report for 1845, p. 193.

[4] Gorachand *v.* Lokenath, 8 W. R., 335 ; Gash *v.* McLean, 2 N. W. P., 403. But the balance in an account stated if signed, is *deemed* to be acknowledged as due —See Andarji *v.* Dulabh, I. L. R., 5 Bomb., 88.

ant was not sufficient.[5] *Oral* admissions, or admissions in respect of matters *other*[6] than legacies and debts, were not recognised by sec. 4. But debts already barred by limitation could be *revived* by a sufficient acknowledgment.[7]

Under sec. 1, cl. 15, and sec. 19 of Act XIV of 1859.

There were two other provisions in Act XIV of 1859, which recognised an acknowledgment in writing, *viz.*, sec. 1, cl. 15, and sec. 19. By the first of these provisions an acknowledgment of the *title* of a depositor, pawnor or mortgagor, or of his *right* of redemption, when in writing, signed by the depositary, pawnee or mortgagee, or some person claiming under him, renewed the period of limitation, if the acknowledgment was made *before* the expiry of the prescribed period.[8] By the second of these provisions, a written acknowledgment of the right to money secured by a decree or order of a Court established by Royal Charter, signed by the debtor or his *agent*, *during* the currency of limitation, and *given to the*

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[5] Beedoobhooshun *v.* Enaet, 8 W. R., 1. But an acknowledgment of the right to a decree of the Supreme Courts was sufficient even when signed by an agent of the judgment-debtor. Sec. 19, Act XIV of 1859.

[6] Admissions in respect of a right to property did not renew the period of limitation. Amrita bin *v.* Anyaba bin, 5 Bomb., 51; Lalla Doorga *v.* Lalla Luchman, 17 W. R., 272. The right of redemption, however, could be kept alive by an acknowledgment under sec. 1, cl. 15.

[7] See ValiaTamburattee *v.* Vira Royan, I. L. R., 1 Mad., 228, 234; Heeralall *v.* Roy Dhunput, 24 W. R., 282, 284. The English law, so far as *debts* are concerned, is to the same effect. (Darby and Bosanquet, p. 54.) But acknowledgments in respect of deposits, pledges and mortgages to be effectual, were (even according to Act XIV of 1859) required to be made *before* the expiry of the prescribed period of limitation, and the same rule applied to acknowledgments of right to principal monies secured by decrees of the Supreme Courts.

[8] Vasudavan *v.* Mussakutti, 6 Mad., 138. See the construction put upon the words "in the mean time," used in cl. 15 as well as in the English Act, in Stanfield *v* Hobson, 2 Smith's Leading Cases, p. 746, 8th Ed.

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*party entitled thereto or his agent*, was a ground for renewing the ordinary period of limitation. An acknowledgment under sec. 4 or sec. 1, cl. 15, even if made to a third party,[9] was sufficient, but an acknowledgment under sec. 19 was required to be given to the party entitled or his agent. An acknowledgment under sec. 19 might be signed by an *agent* of the debtor, but an acknowledgment under sec. 4 or sec. 1, cl. 15,[10] was required to be signed *personally* by the party liable. And while an acknowledgment under sec. 4 might be made even after the expiry of the period of limitation, an acknowledgment under sec. 1, cl. 15, or sec. 19 was required to be made before the expiry of the prescribed period.

Under Act IX of 1871.

Act IX of 1871 did not alter the law so far as acknowledgments of the right or title of the depositor, pawnor, and mortgagor,[1] or of the right to monies secured by decrees or orders of any Court established by Royal Charter, were concerned. Articles 147 and 148 of Act IX exactly correspond to sec. 1, cl. 15, of Act XIV of 1859, and sec. 19 of the latter Act corresponds to art. 169 of the former Act, except that there is no mention in art. 169, that the acknowledgment should be given "in the mean time," *i.e.*, before the expiry of the period of limitation.

The changes introduced by Act IX.

In respect of debts and legacies, Act IX introduced two important changes. In accordance with

[9] Hurro *v.* Monee, 3 W. R., S. C., 6; Dur Gopal *v.* Kasheeram, 3 W. R., 3; see also 5 Bomb., 176.

[10] Luchmeebux *v.* Runjeet Ram, 20 W. R., 375, P. C.

[1] Acknowledgments of the title or right of these persons were ineffectual if signed by *agents* of the makers, although acknowledgments of debts could be so signed under sec. 20, Act IX. (Rahmani *v.* Hulasa, I. L. R., 1 All., 612)

the English Mercantile Law Amendment Act (19 and 20 Vict., c. 97, sec. 13), an acknowledgment, signed by an authorized *agent* of the party to be charged thereby, was rendered as good as one signed by himself. And, in accordance with Construction No. 196 of the Calcutta Sudder Court, and sec. 14 of the Indian Law Commissioners' Bill (1841-42), it was enacted that the acknowledgment, to be effectual, should be made *before the expiration of the prescribed period* of limitation. The terms of the acknowledgment, in accordance with the decisions under the old law, were required to be such as to amount to an unqualified admission of a subsisting liability.

No *promise* to pay, deliver, perform or permit to enjoy is *necessary* in British India.

Although the word 'promise' occurred in sec. 14, Reg. III of 1793, and in sec. 20, Act IX of 1871, no promise to pay was *necessary* to set time running again.[2] The principle of the decisions on the English Statutes (21 James I., c. 16, and 9 Geo. IV, c. 14) in actions of assumpsit is not applicable to similar cases in British India. Those decisions do not depend upon the effect of a *statutory exception*, but upon the principles of the common law with respect to the cause of action. It is incumbent on the plaintiff in assumpsit to prove a *promise* made within the period of limitation, and such as to agree with that laid in the declaration. When the acknowledgment amounts to a fresh promise to pay, that promise is considered as one of the causes of

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[2] See Gopee Kishen *v.* Bindabun, 12 W. R., P. C., 36, 37.

Under the English Common Law, an *implied* promise is sufficient, but under sec. 20, Act IX of 1871, if a *promise* was relied upon as renewing the period of limitation, it was necessary that it should have amounted to an *express* undertaking to pay.

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action which the declaration states. But acknowledgments, whether by words or in writing, are of no avail, save so far as they sustain the promise alleged; there is no *exception* to exclude the operation of the statute. The cases in which acknowledgments are operative by way of *exception* are of a different character. In these, the action must be maintained on the *original* security, and an acknowledgment within the prescribed period of limitation is sufficient, if it shows that the obligation was then subsisting and unsatisfied; a *promise* to pay is not required.[3]

Acknowledgments under Act XV of 1877.

Section 19 of Act XV of 1877 omits all mention of *promises* in connection with acknowledgments. But if there is a fresh promise in writing, and it does not amount to a novation,—that is, a new contract in substitution of the first,—the promise may be treated as a mere acknowledgment. And where there has been a novation, or where the promise is to pay a debt already barred by limitation, a suit may be maintained upon the new contract.[4] So far as decrees of Courts established by Royal Charter are concerned, the exception in respect of acknowledgments, in Act IX of 1871, is not altered or modified by Act XV of 1877. But the same

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[3] 12 W. R., P. C., 36, 37. See the leading English case on the subject,—Tanner *v.* Smart, 6 Barn. and Cr., 603, and Banning, p. 41.

[4] The promise in sec. 20, Act IX of 1871, was a promise by way of exception, in a suit founded on the original cause of action, and not a promise constituting a new contract, and extinguishing the original cause of action. (Roghoji *v.* Abdul, I. L. R., 1 Bom., 590.) An unaccepted promise (or rather *offer*) to pay, might, of course, be treated as an *acknowledgment*.

exception is now extended to orders of Her Majesty in Council.

Amendments made by Act XV. 1. Doctrine extended to any property or right. 2. Extended to *applications.*

Acknowledgments of the right of redemption or of the title of the depositor, pawnor or mortgagor are no longer *separately* provided for. The general exception in respect of acknowledgments (sec. 19 of Act XV of 1877) is so enlarged as to include such cases within it. The general exception is no longer confined to acknowledgments in respect of debts and legacies, but is extended to acknowledgments in respect of *any property or right.*[5]. And it is expressly provided that the limitation periods of *suits*, as well as of *applications*,[6] shall be renewed by acknowledgments under sec. 19.

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[5] Under the old Regulations also, the exception was not confined to suits for debts and legacies. Under English law, in the case of *torts*, no acknowledgment is sufficient to bar the statute. Angell, sec. 209; Banning, p. 40. Under Act XV, a question may arise as to whether an acknowledgment of the mortgagor's *title* is sufficient, *if* there is no acknowledgment of *liability* on the part of the mortgagee. It will probably be held that an acknowledgment of the mortgagor's title by the mortgagee raises the presumption that the mortgage is *liable* to be redeemed by the mortgagor. *If* the circumstances of a particular case are such that this presumption cannot arise, a mere acknowledgment of the mortgagor's *title* will not be sufficient.

[6] Under the Regulations, the period of limitation in cases of applications for the execution of decrees was extended for any reason which seemed good and sufficient to the Court.—Thompson, 2nd ed., p. 344. Under Act XIV there were contradictory decisions as to the application of the exceptions to execution cases. See 3 W. R., Mis., 27; 8 W. R., 63, *contra;* 7 W. R., 79 (as to admissions). See also 4 W. R., Mis., 21, *contra;* 5 W. R., Mis., 10; and 8 W. R., 137 (as to legal disability). In Darsiah *v.* Godain, 4 Mad. Jurist, 101 (as to absence from British India); and Gossain Dass *v.* Khetternath, 4 W. R., Mis., 18 (as to proceedings in wrong court), it was held that the exceptions applied to *suits* only. But in Soorodhonee *v.* Hurrochunder, 9 W. R., 402, F. B., it was held, that *any proceeding* in a Court of justice to enforce a demand was a *suit*. See also I. L. R., 10 Calc., 718. Under Act IX of 1871, it was held, that the word 'suit' in that Act did not include "applications for execution,"

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8. The proviso to the doctrine *extended* to joint contractors and mortgagees.

Section 4 of Act XIV of 1859 provided generally, that if more than one person was liable, none of them should become chargeable by reason of a written acknowledgment signed by another of them.[7] Section 20 of Act IX of 1871 specially provided that one of several *partners* or *executors* should not be so chargeable. Act XV of 1877 (sec. 21) extends this provision to joint contractors and mortgagees, so that one of several joint contractors, partners, executors or mortgagees is not chargeable by reason *only* of a written acknowledgment signed by or by the agent of any *other or others* of them.

In Act XIV of 1859 there was no provision that parol evidence of the contents of a written acknowledgment would not be admissible, where, under the ordinary rules of evidence, the contents of a writing could be proved by parol. In *Haydon* v. *Williams* (7 Bing., 163) it has been held that such evidence is receivable in England. But sec. 20, Act IX of 1871, expressly enacted that oral evidence of the contents of the writing containing the acknowledgment should not be received when the writing was alleged to have been destroyed or lost. Act XV of 1877 (sec. 19)

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Dhonnesshur *v.* Roy Gooder, I. L. R., 2 Calc., 336, F. B; Jiwansingh *v.* Sarnamsingh, I. L. R., 1 All., 97, F. B. But see the opinion of Stuart, C. J., in the last case, and the Privy Council ruling on sec. 1, Act IX of 1871, in Mungal Persad Dichit *v.* Girija Kant Lahiri, 11 C. L. R., 113. In Mungol *v.* Shamakanto, I. L. R., 4 Calc., 807, it was held, that sec. 20 of Act IX of 1871 did not apply to judgment-debts. But the correctness of this decision was questioned by Stuart, C. J., in Ramhit *v.* Satgar, I. L. R., 3 All., 247, F. B. Under Act XV there are contradictory rulings as to whether a right to enforce a decree of a Court is a *right* within the meaning of sec. 19 (see I. L. R., 8 Calc., 716; and I. L. R., 5 Mad., 171).

[7] For decisions on this provision, see 3 Agra, 170; 8 W. R., 63; 2 Mad., 84; and Thompson, p. 246.

goes further, and excludes oral evidence of the contents, even where the original acknowledgment is in the possession or power of the defendant. *Oral* evidence of the contents is not admissible in any case. But *other kinds* of secondary evidence of the acknowledgment, such as copies and counterparts, may be received where a proper case is made out for their admission under sec. 65 of the Evidence Act.

4. Oral evidence of contents of written acknowledgments *entirely* excluded.

Act XV (sec. 19) omits that provision of Act IX which required that an acknowledgment must amount to "an unqualified admission of the liability as subsisting." But there must still be an acknowledgment of liability in respect of the property or right which is claimed by the plaintiff. Even under Act IX of 1871, coupling an acknowledgment (which was otherwise sufficient) with a claim to a set-off, or with a refusal to pay, or an allegation that the debt was not yet payable, was not such a qualification as would have destroyed the effect of an acknowledgment. Such qualifications (if they are qualifications at all) cannot, *a fortiori*, render an acknowledgment insufficient under sec. 19, Act XV of 1877.

5. Omission of the provision that there must be "an unqualified admission of the liability as subsisting."

The requisites[8] of a good acknowledgment under Act XV may be considered under the following heads:

Requisites of an acknowledgment.

1. The acknowledgment must be made with the proper formalities.

2. It must (at least in cases governed by sec. 19) be made before the expiration of the prescribed period of limitation.

3. It must, in terms, be a sufficient admission of liability.

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[8] See Banning, p. 38.

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4. It must be made *by* the proper person.

5. It must, in the case of an application for enforcing a judgment, decree or order governed by art. 180, be made *to* the proper person.

*First*, as to the formalities. The acknowledgment of *liability* must be in *writing*, duly *signed*.

With reference to the first head, Act XV requires that the acknowledgment must be made in *writing*, *signed* by the party to be charged therewith or by his agent duly authorized in this behalf.

What may be proved by oral evidence.

The acknowledgment need not be made in any particular form,[9] provided the admission of *liability* appears in a writing duly signed. The identity [10] of the debt, property or right in respect of which the acknowledgment is made, the name [1] of the creditor or the person entitled to the right or property, and the date [2] of an acknowledgment need not appear on the face of the writing, but may be proved by oral evidence.

Even an account stated must be in *writing*, *signed* by the debtor, in order that sec. 19, Act XV, might apply.[3] In the case of *mutual* dealings where there

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[9] A letter, a deed, an affidavit or a will, may contain the required acknowledgment.—(Brown, p. 658.) Several writings may be relied on as containing the acknowledgment.—(*Ibid.*, 654.) But in Rogers *v.* Montriou, indirect acknowledgments deducible from the tenor of several letters were considered insufficient, and it was held that there must be some principal writing which can be relied on by itself.—(6 B L. R., 550.)

[10] Parol evidence is admissible for the purpose of showing *what* debt or liability is referred to in the acknowledgment, and that the creditor alluded to under a particular name has another name. See Woomesh *v.* Eliza, 12 W. R., O. A., 2 ; Darby and Bosanquet, p. 61 ; Banning, p. 58.

[1] Daiachund *v.* Sarfrar, I. L. R., 1 All., 117, F. B ; Hartley *v.* Wharton, 11 Ad. and Ell., 934; Banning, p. 58.

[2] Sec. 20, Act IX of 1871, and sec. 19, Act XV of 1877 ; Hartley *v.* Wharton, 11 Ad. and Ell., 934.

[3] See Mulchand *v.* Girdhar, 8 Bom., 6 ; Kunhya *v.* Bunsee, 1 Agra, F. B., 94 ; Dukhi *v.* Mahomed, I. L. R., 10 Calc., 284, 287.

are cross demands, if, on a settlement of accounts, items agreed to on one side are wiped out by an appropriation to their discharge of admitted items of claim on the other side, and thereupon a balance is struck, the mutual agreement to set off, *pro tanto*, one set of items against the other, constitutes a *new* consideration for the promise to pay the balance so settled.[4] Even if the agreement is a verbal one, it gives rise to a *new* cause of action[5] *independently* of sec. 19.

The acknowledgment mentioned in art. 180, Act XV, must be *addressed*, or at least *given*, to the person entitled to the decree or order, the right to which is thereby acknowledged.

Whether sealing is signing.

Under sec. 4, Act XIV of 1859, it was held by Justice Macpherson, of the Calcutta High Court, that *sealing* was not *signing*, at least where there was no evidence that the debtor, in affixing his seal, meant it to be considered as his signature.[6] An illustration under sec. 20, Act IX of 1871, declared, that an acknowledgment written and sealed, but not signed by the debtor, was insufficient under that section. This illustration is omitted in Act XV of 1877. In a case[7] decided in 1878, under Act IX of 1871, Justice Jackson observed :—"It has been stated by Mr. Justice Macpherson, in the case mentioned above, that

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[4] Hiradi *v.* Gadigi, 6 Mad., 197 ; Hargopal *v.* Abdul, 9 Bomb., 429.

[5] *Ibid.* See also Palee Ram *v.* Musst. Jankse, 1 Shome's Report, 37 ; Nand Ram *v.* Ram Prasad, I. L. R., 2 All., 641; and I. L. R., 10 Calc., 284, 291.

[6] Ramzan *v.* Luchman, 8 W. R., 513.

[7] Syud Mahomed Ali *v.* Mirza Dilwar Hossain, 2 Shome's Report, p. 135. Though sealing with a seal of the sort in vogue in England may be a very different thing from signing, sealing with an Indian zemindar's seal may be one mode of signing the name. See Rivaz, p. 56.

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a sealing is not a signing. That, no doubt, is so in European countries, but it appears to me that it would be dangerous, as well as unfair, to apply absolutely to people of this country the rule which prevails in England upon a matter of this kind. We cannot put out of sight the habits and usages of the people of this country, and there can be no doubt that, in regard to a great number of persons, particularly persons who are unable to write, as *purdanusheen* ladies usually are (especially among Mahomedans), the affixing of a seal is regarded and understood by them as being a signature. The distinction between signing and sealing is not known to such persons." No reference was made in this case to the illustration under sec. 20 of Act IX of 1871. But as the illustration has been omitted in the present Act, it is clear, that affixing a seal to an acknowledgment *by way of signature* is a sufficient signature within the meaning of the present Act.

Marking is signing.

It has been held, that the mark of a marksman is a sufficient signature.[8] A signature, it seems, may be so signed by an agent under the immediate direction and supervision of the principal as to be in effect the signature of the principal, especially where the latter is incapacitated by illness or otherwise from signing himself.[9] Anything which appears

What amounts to a signature.

[8] Bhumongowda *v.* Eeranah, 7 Mad., 358. This case was decided under Act IX of 1871, but as Act XV is by no means more strict in this respect, the ruling applies to cases of acknowledgments under the present law. Where there is nothing to shew that a particular mark is a mark made by the maker of the acknowledgment *in lieu* of a signature, it is not sufficient (B. I. Company *v.* Koylas Chunder, 10 W. R., 293.)

[9] Banning, p. 118; 11 Ir. L. R., 8. See also the express provisions of sec. 50 of the Indian Succession Act, X of 1865.

to have been *intended* by the writer to be equivalent to a signature would seem to be sufficient—such as, stamping or printing his name instead of writing it, or putting his initials only instead of his full name.—(See Brown on Limitation, p. 584; and I. L. R., 6 Calc., 340, 345.)

The signature may appear in *any* part of the writing.

It is not necessary that the acknowledgment should be signed at the foot or end.[10] Signature at the top is one of the usual modes of signing in this country.[1] As long as the document is signed with the debtor's name by himself or by his duly authorized agent, in such a way as to make it appear that the acknowledgment is his, and that he is the real author of the writing, it matters not what the form of the instrument is, or in what part of it the signature occurs.[2] Where, however, the contents of the paper are divisible, and the signature is placed under or opposite one portion only, the question whether it applies to all or only to that one portion, is purely one of intention.[3] Where a writing is not *regularly* signed, there is always a question whether the party meant to be bound by it as it stood, or whether it was left so unsigned, because he refused to complete it.

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If the maker of the acknowledgment is illiterate, it may, under certain circumstances, be presumed that he authorized another to sign his name. Rivaz, p. 58. When a third party writes the name of the maker at his request, he makes that third party his agent, I. L. R., 7 Bomb., 515.

[10] Khwaja Muhammad *v.* Venkatarayar, 2 Mad., 79, 81.

[1] Andarji *v.* Dulobh, I. L. R., 5 Bomb., 88; Jekisan *v.* Bhowsar, I. L. R., 5 Bomb., 89.

[2] Mohesh Lall *v.* Sumpat Koeri, 7 C. L. R., 121, 134; (S. C.), I. L. R., 6 Calc., 340, 352. It must be shewn that the name was introduced into the writing with a view to authenticate it.—See Mathura *v.* Babu Lal, I. L. R., 1 All., 683, 686.

[3] Brown, p. 586.

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Instances of irregular signatures.

Where the whole of an account stated was written by a debtor himself with the introduction of his name at the top of the entry, the statement was held[4] to be sufficiently signed within the meaning of Act XV of 1877, sec. 19. A letter in the handwriting of the debtor's agent (in answer to an application by the creditor for a settlement of accounts), commencing with the words "compliments of A. B.," and admitting a debt due to the creditor, is an acknowledgment signed within the meaning of the law, although it is not *formally* signed by A. B., or his agent. It seems that the acknowledgment is quite effectually signed whether it runs thus:—"Dear Sir,—I beg to acknowledge the correctness of your account. Yours A. B."; or thus:—"A. B. presents his compliments to C. D., and begs to acknowledge the correctness of his account."

Agent's signature of his own name sufficient.

And as to the name of the principal being written by the agent, it seems clear that if the agent is authorized to write the letter, it matters not whether he signs the name of the principal or his own name.[5]

What acknowledgments should be stamped.

Besides being *written* and *signed*, some acknowledgments must be *stamped*, and it has been held some must be *registered*.

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[4] Jekison *v.* Bhowsar, I. L. R., 5 Bomb., 89. Even in England, where a whole document is in the handwriting of a person, his name at the top is a sufficient signature.—Banning, p. 58.

[5] Mohesh Lall *v.* Sumput Koeri, 7 C. L. R., 121, 134.

In Hem Chand *v.* Vohara (I. L. R., 7 Bomb., 515), the following was considered a sufficiently signed acknowledgment:

"Written by A. B.—to wit, Rs. 26 are due as stated above, dated 11th Choitra 1936. In the handwriting of C. D."

In this case it was proved that as A. B. could not write, he got the acknowledgment, including his name, written by C. D.

Under Act XVIII of 1869, sched. ii, cl. 5, one anna was the proper stamp-duty for a "note or memorandum written in any book, or written on a separate paper, whereby any *account*, *debt* or *demand*, or any part of any account, debt or demand therein specified, and amounting to twenty rupees or upwards, is expressed to have been balanced, or is *acknowledged* to be due."

Under the present Stamp Act (I of 1879), sched. i, cl. 1, one anna is the proper stamp-duty for an "acknowledgment of a *debt* exceeding twenty rupees in amount or value, written or signed by or on behalf of a debtor, *in order to supply evidence of such debt* in any book (other than a banker's pass-book) or on a separate piece of paper, when such book or paper is left in the *creditor's possession*."

It was held under the Stamp Act of 1869 that a writing on a one-anna stamp, acknowledging a balance of account due to the plaintiff, with the addition of the words "to be paid next January, 1878," although not admissible in evidence as a promissory note in proof of a promise to pay, by reason of its being insufficiently stamped, was admissible, on the stamp which it bore, as a memorandum in proof of an *acknowledgment* of a debt.[6] According to several rulings of the Calcutta High Court, an unstamped acknowledgment of debt (or other document), if received in the Court of first instance, cannot be objected to on appeal.[7] Acknowledgments of liability

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[6] Kanhaya Lal *v.* Stowell, I. L R., 3 All., 581, F. B.

[7] See Mohesh Lall *v.* Busunt, I. L R., 6 Calc., 340, 316; Khoob *v.* Jungh, I. L. R, 3 Calc., 787. *But* see I L. R., 2 All., 554, and I. L. R., 5 Mad., 166.

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in respect of *other* rights were not required to be stamped under the Stamp Act of 1869. And now, even acknowledgments of *debts* are required to be stamped only, when they are written *in order to supply evidence of such debt*, not when they are written merely to renew the period of limitation.[8]

What acknowledgments, if any, should be registered.

Acknowledgments of *debts* are not compulsorily registrable. They may or may not be registered. A deed of sale of immoveable property of the value of Rs. 100 or upwards must be registered in order that it may be admissible as evidence of the transfer. But an acknowledgment of a pre-existing debt in such an instrument, even if not registered, is admissible for the purpose of renewing the period of limitation for a suit for the recovery of such a debt.[9]

But defendant's acknowledgments of plaintiff's *title* to immoveable property of the value of Rs. 100 and upwards are, it has been held, declarations of right within the meaning of the section under which registration is compulsory, and that such acknowledgments, if unregistered, are not admissible in evidence, even for the purpose of renewing the period of limitation.[10] But it may be doubted[1] if the

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[8] It should be borne in mind that the Stamp and Registration Acts in force at the time of the execution of written acknowledgments are the Acts which govern their admissibility in evidence. But the question whether an acknowledgment of liability is or is not operative as a bar to limitation, depends on the Law of Limitation in force at the time of the institution of the suit. (See Mohesh Lal *v.* Busunt, I. L. R., 6 Calc., 340, 349; and Dharma *v.* Govind, I. L. R., 8 Bomb., 99.)

[9] Nund Kishore *v.* Mussamut Ramsookhee, I. L. R., 5 Calc., 215; and Khusalo *v.* Beharilal, I. L. R., 3 All., 523.

[10] Foki *v.* Khotu, I. L. R., 4 Bomb., 590.

[1] Mr. Justice West is of opinion that the word 'declare' in sec. 17 of the Registration Act, III of 1877, coupled as it is with the words 'create,'

acknowledgment of a pre-existing right, where there has been no change of legal relation to the property, is a *declaration* within the purview of the Registration Act. And where a written acknowledgment of liability is made without an *express* admission of the title or right of any *particular* person, as where a record of rights prepared in connection with the settlement of an estate with the defendants in which they are described as mortgagees of the estate, but which does not mention the name of the mortgagor, is attested by the defendants as correct, such acknowledgment may be effective[2] under sec. 19 of Act XV, although it is not registered. A record of rights prepared by a settlement-officer is exempted from the provisions of the Registration Act,[3] but a similar acknowledgment in *any* writing is a sufficient acknowledgment of the mortgagee's liability to be redeemed.[4] For it can hardly be contended that such a writing by itself "operates to *declare*" the mortgagor's right to redeem.

Acknowledgments which are invalid on *other* grounds.

An acknowledgment to be valid must (in other respects) also comply with the *general* principles of law applicable to the execution of contracts and conveyances, so that an acknowledgment obtained by fraud or duress, or from a person who cannot act for himself, is of no use whatever.

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'assign,' 'limit,' or 'extinguish,' implies a declaration of will by which a *change* of legal relation is effected,—not a mere statement of an existing fact.—Sakharam *v.* Madan, I. L. R., 5 Bomb., 232. It is a *declaration* if the writing itself amounts to a release operating or intended to operate as a declared volition constituting or severing ownership.—*Ibid.*

[2] Daia Chand *v.* Sarfrar, I. L. R., 1 All., 117, F.B.

[3] See sec. 90, Act III of 1877.

[4] 3 Atkyn's Report, at p. 114; see I. L. R., 1 All., 123; but see Banning, p. 171.

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*Secondly*, under sec. 19, the acknowledgment must be made *within* the period of limitation.

Under the second head, it is only necessary to mention, that although sec. 28 of Act XV extinguishes only the *right to property* (whether moveable or immoveable) at the determination of the period prescribed for the institution of a suit for *possession* of such property, and although it is clear that the obligation of the debtor to pay his *debt* is *not* extinguished by limitation,[5] it has been expressly provided (see sec. 19 of Act XV and sec. 20 of Act IX) that every acknowledgment, in order that it may renew the period of limitation, must be made *before* the expiration of the prescribed period. In cases where the right is extinguished, there is no subsisting right which may be acknowledged. But in cases where the *remedy* only is barred, and the *right* is left *in esse*, it is not necessary, in England, that the acknowledgment should be made before time has finally run in favor of the maker.[6] It may be observed that the most important suits (besides suits for possession of property) to which the doctrine[7] of reviving a remedy

[5] See pp. 4 and 15, *supra*.

[6] Banning, p. 38. The Law of British India *was* the same under sec. 4, Act XIV of 1859.

[7] In England, the common law "doctrine of acknowledgment applies only to cases founded upon assumpsit. If the gist of an action is the injury committed by the defendant, and the right of action is once barred by time, it is impossible to revive it by admission of indebtedness; and in the case of torts no acknowledgments will suffice to avoid the express words of the statute" of James I. See Banning, p. 40. An acknowledgment cannot *revive* the remedy where the cause of action is either a tort, or a breach of a contract to do or to omit to do some *act*. "Where, upon such a breach the damages are not liable to be assessed, but a definite sum can, by stipulation between the parties, be recovered as *liquidated damages*, the following distinction appears to arise, *viz.*: that a mere acknowledgment of the breach can have no effect, but an acknowledgment of the stipulated sum being due takes the case out of the statute."—Darby and Bosanquet, p. 69.

*barred* by limilation might apply, *viz.*, suits for debts and liquidated amounts, are sufficiently provided for by cl. 3, sec. 25, Act IX of 1872. If the written acknowledgment of liability amounts to a *promise* to pay, and it very often does so, a suit may be brought upon the promise as a fresh and an independent cause of action, although there is no consideration for the promise, except the debt which has been already barred (but not extinguished) by limitation. And although the principle of this provision of the Contract Act, IX of 1872, is not altogether new to our Courts,[8] it was not *expressly* recognized by the Legislature until about the time when Act IX of 1871 (which introduced this requisite of an acknowledgment) came into operation.[9]

If a suit is *barred* at the date of its institution, an acknowledgment made *after* the institution can be of no use under sec. 19, Act XV.

Otherwise, under art. 180, sched. ii.

It has been already remarked that art. 180, sched. ii, Act XV (like art. 169 of Act IX of 1871), *omits* to mention that an acknowledgment of the right to money secured by certain decrees or orders should be made *before* the expiration of the period prescribed for enforcing such decrees or orders. And as sec. 19 of Act XV does not say[10] that "*no* acknowledgment

[8] Heeralall v. Roy Dhunput, 3 C. L. R., 554 ; I. L. R., 4 Calc., 500.

[9] Under sec. 4, Act XIV of 1859, which governed suits instituted before the 1st April 1873, an acknowledgment made *after* the period of limitation revived the remedy on the original cause of action.

[10] Section 20 of Act IX of 1871 *did* say so, and if the acknowledgment of a *judgment-debt* was an acknowledgment within the meaning of that section, there was some reason for omitting the words "before the expiration of the prescribed period" in the proviso to art. 169 of sched. ii of that Act. In the corresponding provision of Act XIV (*viz.*, in sec. 19)

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shall take the case out of the operation of this Act, unless such acknowledgment is made before the expiration of the prescribed period," it may be fairly contended that an acknowledgment under art. 180 (in respect of a decree of a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or of an order of Her Majesty in Council) is an effectual acknowledgment even when it is made *after* the expiry of the prescribed period of limitation. But the validity of this contention has not been admitted in any reported case that I know of. It may be observed that the language of the proviso is very similar to the language used in sec. 40 of 3 and 4 Will. IV, c. 27, the only important difference being that the English statute (like sec. 19, Act XIV) requires that the acknowledgment should be made "in the mean time" and that, in two cases at least, it was the opinion of the Court that an acknowledgment made *after* the expiry of the prescribed period would have no effect (under sec. 40) in reviving the right to recover.[1] The omission of the words "in the mean time" in the corresponding article of Act XV is therefore significant.

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the words "in the mean time" did duty for the words "before the expiration of the prescribed period." If an acknowledgment under art. 180, Act XV, may be made, *after* the prescribed period, we arrive at this curious result, that while an *ordinary* debt, even when barred, could be *revived* by an acknowledgment under Act XIV, a *judgment*-debt in a Court established by Royal Charter, in the exercise of its ordinary original jurisdiction, could *not* be so *revived;* and while an ordinary debt, if barred, *cannot* be revived by an acknowledgment under Act XV, a judgment-debt in a Court established by Royal Charter, &c., *may be* so revived.

[1] See Darby and Bosanquet, p. 160; Gregson *v.* Hindley, 10 Jur., 383; and Homan *v.* Andrews, I Ir. Ch. R., 106.

*Thirdly*, what is, in terms, a sufficient acknowledgment.

Thirdly, an acknowledgment under sec. 19, Act XV, must be an acknowledgment of *liability* in respect of *the property or right* which is claimed in the suit or application. An acknowledgment is sufficient, even if the maker (wrongly) avers that the time for payment, delivery, performance or enjoyment has not yet come.[2] An admission that a sum of money will be payable on the happening of an event, *future and uncertain*, was held to be insufficient under Act XIV of 1859,[3] and will probably be insufficient under the present law. But an admission of liability, coupled with a promise to pay, deliver, perform, or permit to enjoy, at some future time, or as soon as practicable,[4] is sufficient.

The *present* received doctrine as to the theory of acknowledgments, according to the common law of England,[5]—namely, that an acknowledgment to be effectual must (directly or indirectly) amount to a fresh *promise* to pay,—has never been adopted by the Indian Legislature. Under the *old* English doctrine whatever repelled the presumption of payment or satisfaction, was a sufficient acknowledgment, so that even if the admission were accompanied by a refusal to pay, or a claim of the benefit of the statute of limitation, the case was still held to be taken out of the statute.[6] Under the law of British India (as well as under the 3 and 4 Will. IV, chapters 27 and

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[2] Act XV of 1877, sec. 19, expl. 1; Young *v.* Mangalapilly, 3 Mad., 308.
[3] Young *v.* Mangalapilly, 3 Mad., 308.
[4] Woomesh *v.* Eliza, 12 W. R., O. A., 2.
[5] Banning, p. 41; Tanner *v.* Smart, 6 Barn. & Cr., 603.
[6] Darby and Bosanquet, p. 46.

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Instances of sufficient and insufficient acknowledgments.

42 in England) a promise or the implication of a promise is not necessary; and it is expressly laid down that an acknowledgment of liability, though accompanied by a refusal to satisfy the obligation, is sufficient for the purpose of renewing the period of limitation. Thus acknowledgments in the following terms are sufficient[7]:—"I know that I owe the money, but the bill I gave is unstamped or insufficiently stamped, and I will never pay it." "I cannot afford to pay my new debts, much less the old debt due to you."

The following letter to an agent of the creditor was considered by the Allahabad High Court[8] to contain an unqualified admission of a subsisting debt under sec. 20 of Act IX of 1871:—"With regard to your communication anent promissory notes given by me to Mr. S., and which I have not paid, I must only say that Mr. S. must trust to my integrity to pay him, and as soon as I have cleared off a couple of decrees against me I will commence paying him; but if you put the matter into Court, I must only plead want of consideration, and throw Mr. S. back on the original decree which had lapsed some three years before I wrote the promissory notes." As Act XV is by no means more strict than Act IX in this respect, the above is, of course, an acknowledgment of liability within the meaning of sec. 19, Act XV. But where the debtor admit-

[7] Such acknowledgments are now insufficient in cases under 21 James I, c. 16, which makes no (statutory) exception in favor of acknowledgments. See Banning, pp. 42 and 50.

[8] Mullins v. Beddy, 6 N. W. P. H. Ct. Rep., 150.

ting the making of a promissory note, wholly repudiates his liability in respect thereof, the admission is not an acknowledgment of liability.[9] If the debtor couples his admission with the allegation that he has paid the debt, or that the debt is barred by limitation, and that he is *no longer liable to pay* it, the creditor cannot, it is apprehended, take advantage of the admission, even if he proves that the allegation of payment or of the bar of limitation is incorrect.

A letter containing no admission of a liability, or the justice of a demand, but only doubtful expressions, is not sufficient.[10] Thus, if a debtor writes,[1] "if I have to *stump up* (*i.e.*, pay your reckoning), the sooner it is done the better, though it would go against all my ideas of justice and right,"—the writing is insufficient as an acknowledgment. A "remittance of £40 to old account" does not necessarily show that the debtor is liable to pay any more. These words dot not amount to a sufficient acknowledgment.[2] So again, the words "I do not wish to avail myself of the Statute of Limitation," or the words "I hereby debar myself of all future plea of the statute," do not, by themselves, show that the debtor does not intend

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[9] See Narbada *v.* Rughoonath, 2 Bom., 349. This case was decided under Bombay Reg. V of 1827.

[10] Gash *v.* McLean, 2 N. W. P. H. Ct. Rep., 403.

[1] The Uncovenanted Service Bank *v.* Marshall, 6 N. W. P. H. Ct. Rep., 306. It was probably on this ground that a letter from the Commissioner of Revenue, expressing his willingness to *recommend* the Government to pay compensation for land taken by Government from the plaintiff's estate, was held to be no acknowledgment of plaintiff's right to compensation. Hills *v.* The Government, 11 W. R., 1.

[2] Shearman *v.* Fleming, 5 B. L. R., 619.

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to defend the action upon its *merits*, and are therefore insufficient as an acknowledgment of liability.[3]

Although it is true, that a debtor's petition "stating that the decree-holder had executed the decree against him, and got his property attached, and that a day has been fixed for the sale, and praying that two months' time might be sanctioned, and, the attachment subsisting, the 8th February next might be fixed for the sale," does not contain any admission that the decree could be legally executed against the debtor, and cannot be treated as an estoppel,[4] it has been held that the debtor's petition to postpone a sale of his property, in which he expressed his willingness of making some private arrangement for *paying off the debt* is a sufficient acknowledgment of liability within the meaning of sec. 19, Act XV of 1877.[5]

The liability acknowledged must be in respect of the *particular* claim of the plaintiff. But the *exact* amount or nature of the liability need not be *specified*.

It is not necessary that the writing should specify the exact amount of the debt or legacy, or the exact nature of the property or right, in respect of which the acknowledgment is made; but there must be some acknowledgment of the existence of a liability arising out of *the particular* cause of action on which the suit is afterwards brought.[6] The debt or liability acknowledged by the maker must be shown either by the writing or by parol evidence to refer to the particular claim or claims which the

[3] Such doubtful expressions of admission are also insufficient under the English law. See Banning, pp. 51 and 52.

[4] Mina *v.* Juggut, 13 C. L. R., 385, 391, P. C.

[5] Ramhit *v.* Satgur, I. L. R., 3 All., 247; Ramcoomar *v.* Jakur, I. L. R., 8 Calc., 716.

[6] Narrayanapa *v.* Bhaskar, 7 Bomb., 125; see also I. L. R., 6 Mad., 182. Cf. I. L. R., 7 Mad., 392.

plaintiff makes in the suit. If there is more than one debt due to the plaintiff, and the defendant acknowledges one, parol evidence is admissible for the purpose of shewing that the acknowledgment relates to the debt for which the suit is brought.[7] Where there are several debts, and the defendant merely writes to ask the plaintiff to come and take what is due to him, if it is impossible for the plaintiff to prove that the debt referred to is any *other* than the one which the defendant subsequently chooses to admit in his statement, the acknowledgment of liability is *practically* ineffectual.[8]

In many cases (specially where there is a single debt or a single cause of action) an acknowledgment would be binding though the amount due has not been ascertained at the time.[9] Where a letter, admitting liability, states that the account rendered by the creditor is on the face of it correct, but that the writer reserves to himself the right of testing the account by his own books before finally allowing it to be correct, there is an acknowledgment which is sufficient for the purpose of renewing the period of limitation.[10] An admission of the debt is sufficient, although the exact amount payable is disputed or remains to be proved.[1] A letter acknowledging a debt due but asking for the exact amount is suffi-

[7] See Woomesh *v.* Eliza, 12 W. R., O. A., 2.

[8] Nobin *v.* Kenny, 5 W. R., S. C. Ct. Ref., 3, as explained in Pearce *v.* Woomesh, 9 W. R., 140

[9] Pearce *v.* Woomesh, 9 W. R., 140.

[10] Mothura *v.* Babu Lal, I. L. R., 1 All., 683.

[1] Colledge *v.* Horn, 3 Bing., 119; Banning, pp. 45, 53; see also 5 B. L. R., 619; 9 B. L. R., App., 43; Mohesh *v.* Bussunt, I. L. R., 6 Calc., 340, 353; and Skeet *v.* Lindsay, 2 Ex. D., 314.

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Admission of a *definite* smaller debt.

cient.[2] But where a *definite* sum, smaller than the amount claimed, is named in the written acknowledgment, and parol evidence cannot be given to shew that a larger amount was meant to be admitted by the debtor, the acknowledgment, it is apprehended, is not sufficient for taking out of the statute the *whole* amount claimed by the creditor.[3]

Admission coupled with a conditional promise.

If a debtor accompanies his acknowledgment with a promise to pay upon any condition, it is not necessary under the Indian law to prove the fulfilment of the condition, unless the suit is brought on the promise as a fresh cause of action. The acknowledgment of liability is sufficient to renew the period of limitation on the original cause of action.[4]

Qualified admissions.

Act XV does not require an unqualified admission of liability. The following letter, it is apprehended, contains a sufficient acknowledgment of liability:—"I have received a letter from your solicitors, requesting me to pay you an account of £40. I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1875; but as you declare it was not settled, I am willing to pay you by instalments."[5] The creditor is not legally bound to give

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[2] Rendell *v.* Carpenter, 2 Y. and J., 484; see I. L. R., 6 Calc., 343; and Darby and Bosanquet, p. 49.

[3] Darby and Bosanquet, p. 61. An acknowledgment that a *part* of a debt was due was sufficient under the express provisions of sec. 4, Act XIV of 1859.

[4] See Mohesh *v.* Bussunt, I. L. R., 6 Calc., 340, 345, 353. It is otherwise under the English common law, see Banning, p. 47.

[5] See Banning, p. 46. Proof of the creditor's assent is necessary to render such an acknowledgment effectual in England.

time for payment by instalments, although he relies on an acknowledgment which asks for time to pay.[6] It is not necessary that the creditor should assent to the terms of an acknowledgment before he takes advantage of it.[7]

Advertisement to bring in claims.

An illustration under sec. 20, Act IX, expressly laid down that an advertisement to creditors merely to bring in their claims, had no operation as an acknowledgment, and there can be little doubt that the law is still the same.[8] It may, however, be otherwise, if the advertisement contains a promise to pay all persons on application who have debts owing to them by the advertiser.[9]

Requisites of sufficiency.

As a general rule, it may be laid down, that an acknowledgment under sec. 19 of Act XV must amount to such a clear *admission of an existing liability* as would renovate the liability at the time of such acknowledgment. The admission must be made in writing, either by *express words* or by *necessary implication* from the words used,[10] and the maker must be *conscious*[1] that he is admitting by

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[6] Pearee *v.* Woomesh, 9 W. R., 140, 141.

[7] Offering to pay the creditor by instalments, and praying to be excused from the payment of interest, is a sufficient acknowledgment of debt, irrespective of the debtor's assent. Shah Mukkum *v.* Nawab Imtiazoodowlah, 5 W. R., P.C., 18. In Laljee *v.* Raghoonondon, I. L. R., 6 Calc., 447, the plaintiff sued upon a written acknowledgment to which he was no party, and although he had never before openly assented to the amount acknowledged, it was held that he was entitled to a decree for the amount, so long as the acknowledgment remained uncontradicted and unexplained by the debtor.

[8] See Darby and Bosanquet, p. 67.

[9] See Banning, p. 275; Andrews *v.* Brown, Prec. in Ch., 335.

[10] As to implication, see Ramcoomar *v.* Jakur, I. L. R., 8 Calc., 716, 718; Daiachand *v.* Sarfrar, I. L. R., 1 All., 117.

[1] See Dharma *v.* Govind, I. L. R., 8 Bomb., 99.

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If a debtor's letter[3] to the creditor contains only the following words:—"Send any demand you have; if just, I will not trouble you,"—the letter, it is apprehended, is not a *written* acknowledgment of liability, though it may be proved *aliunde* that the demand is a just one. But the admission of a liability, coupled with a claim to a set off, does not render the admission less effectual.[4]

Where a mortgagee obtained possession of the mortgaged property in execution of a decree against the mortgagor, and filed a receipt in Court, in which he acknowledged having received possession as directed by the decree, it was held,[5] that the reference to the decree was merely a means of defining the property delivered, and not to the contents of the whole decree, that to suppose that the writer of the receipt thereby admitted the mortgagor's title would be "to go beyond what probably was present at all to his *consciousness*" at the time he gave the receipt, and that therefore the receipt, notwithstanding the reference to the decree, was insufficient as an acknowledgment of the right of redemption under sec. 19, Act XV of 1877.

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[2] Venkatarawar a *v.* Srinivas, I. L. R., 6 Mad., 182.

[3] Darby and Bosanquet, p. 51. Such a letter is insufficient under English law; but an offer on the part of the defendant to settle accounts, though claiming balance as due to him, is sufficient. If this claim can be looked upon as a claim to set off, the offer to settle accounts may amount to an acknowledgment of liability under the Indian law.

[4] Explanation, sec. 19, Act XV. Darby and Bosanquet, p. 61.

[5] Dharma *v.* Govind, I. L. R., 8 Bomb., 99, 102.

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Rights of any kind may be acknowledged under Act XV.

There is nothing in sec. 19 to restrict its operation to acknowledgments of any particular classes of rights. A right to compensation, even in a case of tort,[6] or a right to enforce a judgment or decree[7] is, it is apprehended, a right within the meaning of the section.

*Fourthly*, who must make the acknowledgment.

Under the fourth head, sec. 19, Act XV, requires that the acknowledgment must be signed (that is, made) by the party against whom any property or right is claimed, or by some person through whom he derives title or liability, or by a duly authorized agent of such party or person.

Infants and their guardians cannot.

It is settled law in England, that as an infant is capable of contracting a debt for necessaries, he is also capable of acknowledging such a debt. (Darby and Bosanquet, p. 66.) But under secs. 10 and 66 of the Indian Contract Act, an infant cannot render himself personally liable even by a so-called contract for necessaries; and as an aknowledgment virtually re-creates the original liability, it is apprehended that an infant, or a personwhois otherwise incom-

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[6] For the English law on the subject, see p. 288 (note), *supra*.

[7] The Privy Council considers a right to enforce a decree a vested *right*, which should not be retrospectively affected by a new law. (Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, 56.) And the Calcutta and Allahabad High Courts consider sec. 19, Act XV, applicable to ackuowledgments of rights to enforce decrees. (See Ramcoomar *v.* Jakur, I. L. R., 8 Calc., 716; and Ramhit *v.* Satgur, I. L. R., 3 All.., 247, F. B.) But the Madras High Court think "it would be productive of the greatest inconvenience (if it indeed were possible) to apply the provisions of sec. 19 to applications made in the course of suits or proceedings." According to this view, an acknowledgment of the existence of a judgment-debt, or of a right to apply for a review of judgment, or to make any other application in the course of a suit, will not renew the period of limitation for enforcing the judgment or making the application. Rama Raw *v.* Venkatisa, I. L. R., 5 Mad., 171, F. B.

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petent to contract, cannot make a valid acknowledgment of liability. However, as the guardian of an infant and the committee of a lunatic represent their wards, and as they are not accountable for honestly paying barred debts,[8] it may be contended that an acknowledgment by the guardian or the committee is an acknowledgment by the infant or the lunatic. But, according to the terms of the section, an acknowledgment to have the effect of renewing the period of limitation must be made by the party against whom the right is claimed; and it has been held that, as the liability to pay the debts of their wards is not transferred to guardians and managers, their acknowledgments are ineffectual to save limitation.[9]

Acknowledgment by executor or administrator of debtor binds his estate.

The case of an executor or administrator of a deceased person is very different. The probate or letters of administration vest the entire property of the deceased in the executor or administrator, and he is in all respects the legal representative of the deceased. An acknowledgment by an executor or administrator will, therefore, preserve a claim as against all parties beneficially interested in the property of the deceased.[10]

Where there are several executors or administrators, the powers of all may, in the absence of any

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[8] Chowdhry Chuttarsal *v.* The Government, 3 W. R., 57.

[9] Shaikh Rearoodeen *v.* The Collector, 10 W. R., 175; Azuddin *v.* Lloyd, 13 C. L. R., 112. Unless the guardian is shewn to be legally *authorized* to make acknowledgments, his acknowledgments are ineffectual.

[10] See Putnam *v.* Bates, 3 Russ., 188; Brown, p. 606. Under Indian law, even the *real* estate vests in the executor or administrator; see sec. 179, Act X of 1865; and sec. 4, Act V of 1881.

direction to the contrary in the will or grant of letters of administration, be exercised by any one of them who has proved the will or taken out administration.[1] If one of them, acting in his representative character, gives an acknowledgment, such acknowledgment may bind the *estate* of the deceased debtor.[2]

Acknowledgment by a receiver.

Whether a receiver appointed by a Court of competent jurisdiction of the estates of the debtor, or other person against whom the right is claimed, can give an acknowledgment and renew the period of limitation, may be a question. It has been held in England that he can do so in some cases.[3] His acknowledgment is good, if he may, under the circumstances of the case, be treated as the *agent* of the debtor.

Acknowledgment by one of several joint debtors, &c.

As it ought not to be in the power of any person, by his acknowledgment, to keep alive a right of action against another, which but for such acknowledgment would have been wholly extinguished, it was provided by sec. 4, Act XIV of 1859, that, if more than one person was liable, none of them should become chargeable by reason only of a written acknowledgment signed by another of them.

Explanation 2 of sec. 20, Act IX of 1871, adopted the principle of this proviso, but it referred only to the cases of several executors and several partners. Section 21, Act XV of 1877, is more extensive, for it

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[1] See sec. 271, Act X of 1865, secs. 92 and 93 of Act V of 1881.

[2] See Brown, pp. 607, 608; Ramnarain *v.* Chunder Kant, 8 W. R., 63. But such acknowledgment will not renew the period of limitation against the other executors or administrators, unless the maker of the acknowledgment is shewn to have acted as their *agent*.

[3] See Brown, p. 594: and Chinnery *v.* Evans, 11 H. L. C., 115.

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mentions two additional cases,—*viz.*, the cases of several joint contractors and mortgagees. By the present law, in the case of these four classes of persons, it is expressly provided that an acknowledgment by one or more of several persons does not by itself bind any other or others of them. Where the liability is not several, or being joint is not apportionable, an acknowledgment by *one* of such persons will hardly be of *any* use to the plaintiff; and it has been held in an English case that an acknowledgment by one of several joint mortgagees who were trustees, and who had therefore no apportionable interest in the premises, was ineffectual *altogether*.[4]

Where the liability is not apportionable.

Acknowledgment by one of several joint mortgagors, administrators, coparceners, or tortfeasors.

Section 21 of Act XV does not refer to acknowledgments made by one of several joint mortgagors, administrators, coparceners or tortfeasors. But this omission does not justify the conclusion that an acknowledgment by one of each of these several classes of persons is necessarily binding on the others.[5] A joint co-mortgagor is a joint co-contractor, and as such is entitled to take advantage of the provisions of sec. 21. There is no special reason applicable to the case of several administrators as opposed to several executors, which could have induced the

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[4] Richardson *v.* Younge, L. R., 6 Ch., 478. Banning, pp. 169, 170. The Punjab Chief Court, it would seem (see Rivaz, pp. 54, 55) would give no effect to an acknowledgment by one of two joint mortgagees in any case unless the maker acted as the agent of the other. The reason assigned is, that there is no provision (as there is in sec. 28 of 3 and 4 Will. IV, c. 27) giving such acknowledgment the effect of breaking up the joint mortgage into portions. If reference to the speech of the Legal Member in the Legislative Council were allowable, it would have appeared that the Legislature did not *intend* that there should be any difference between the Indian law and the English law on this subject.

[5] As to the English law on this subject, see Brown, p. 603.

Legislature to apply a different rule to their case. As for several coparceners, if each of them has constructively a separate and distinct possession, there is no reason to suppose why any one of them should be bound except by his own act. Generally speaking, the liability of tortfeasors is *several*, and it was not necessary to *enact* that the acknowledgment of liability by one tortfeasor should not keep alive the *several* liability of another.

By one of several joint tenants.

It is apprehended, that sec. 21 mentions those cases only in which the act of one of a set of persons is likely to be considered as the act of the others, and, by way of explanation, it tells us that, even in these cases, the acknowledgment of one shall not renew the period of limitation against the others. The case of one of several joint-tenants of property under the *Mitakshara*, making an acknowledgment of right, might have been mentioned, but unfortunately no reference is made to such a case.

When the person making the acknowledgment sustains, and is liable in, two perfectly distinct characters, the Courts look to the character in which the acknowledgment is made.[6]

Who are agents authorized to make an acknowledgment.

An agent for making an acknowledgment may be authorized to do so in any of the modes recognized by law. "No one," says Mr. Brown,[7] "can become the agent of another person except by the will of that other person. His will may be manifested in writing, or orally, or simply by placing another in a situation in which, according to ordinary rules of

[6] Brown, p. 615; Fordham *v.* Wallis, 10 Hare, 217.
[7] Brown, p. 624.

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law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him, but in every case it is only by the will of the employer that an agency can be created. The appointment of an agent, therefore, is either express or implied. When express, may be either in writing or by parol. When implied, may be either by the employment, or by the adoption and ratification of the acts of another person."[8] The authority of the agent may be general or special.[9]

Authority need not appear on the face of the writing.

It is not necessary that the authority of the agent should appear on the face of the written acknowledgment. The fact that the agent had authority may be proved by parol evidence,[10] except where the principal is a corporation aggregate.[1]

Authority to borrow.

An authority to make an acknowledgment may be inferred from an authority to borrow.[2] Even where there is a *written* general authority, other evidence may prove the existence of such authority,[3] though it is certainly better to produce the *am-mookhtarnamah* or

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[8] As to prior express authority and subsequent ratification, consider the maxim *Omnis ratihabitio retrotrahitur, et mandato priori acquiparatur*, and see Ram Kumar *v.* Jakur, I. L. R., 8 Calc., 716, 718; and Dinomoye *v.* Lechmiput, 6 C. L. R., 101, 105, P. C.

As to the implied general authority of *dewans* and *mohurirs*, whose ordinary duty it would be to carry on their master's correspondence, see Mohesh *v.* Bussunt, I. L. R., 6 Calc., 340, 351.

[9] See sec. 20, Act IX of 1871.

[10] See Hemchand *v.* Vohara, I. L. R., 7 Bomb., 515, 518.

[1] Brown, p. 625. For an exception to this exceptional rule, see p. 626.

[2] Dinomoye *v.* Luchmiput, 6 C. L. R., 101, 105, P. C.

[3] Sec. 91 of the Evidence Act refers only to the terms of *contracts, grants* or *dispositions of property*. See 6 C. L. R., 105, P. C.

give secondary evidence of its contents, where such evidence is admissible.

An acknowledgment signed by a person whose service as general agent of the maker had come to an end is, of course, of no effect, where the creditor or his manager is aware of the fact.[4] Authority to adjust accounts, whether special[5] or general, is sufficient for the purposes of an acknowledgment. But the authority should have reference to the claim in question.[6] A pleader making a written acknowledgment in a petition will bind his principal if he is generally or specially authorized to make the acknowledgment, or if his acts are ratified by the principal.[7]

Authority to adjust accounts.

Pleader's authority.

A person making an acknowledgment in writing at the request, and in the name, of the person liable, is his agent to all intents and purposes.[8]

It has been held that the managing member of a joint Hindu family has the same authority to acknowledge as he has to create debts on behalf of the family, but has no power, without special authority, to revive a claim *already barred* by limitation, except as against himself.[9]

Authority of the *karta*.

An acknowledgment under sec. 19, Act XV, may be *made to a stranger*, but an acknowledgment

*Fifthly*, To whom must [illegible]

[4] See 6 C. L. R., p. 106, P. C.

[5] See 6 C. L. R., p. 107.

[6] Brown, p. 629.

[7] Ram Coomar *v.* Jakur, I. L. R., 8 Calc., 716, 718; Ramhit *v.* Satgur, I. L. R., 3 All., 247.

[8] Brown, p. 630; Hemchand *v.* Vohara. I. L. R., 7 Bomb., 515, 518.

[9] Chinnaya *v.* Gurunatham, I L. R, 5 Mad., 169, F. B., which overrules Kumarasami *v.* Pala, I. L. R., 1 Mad., 385. See also 14 B. L. R., 21 (Gopal Narain *v.* Muddomuttee), as to debts already barred. Cf. the remarks of Westropp, C. J., at p. 72, I. L. R., 2 Bomb. A barred debt can be revived by a *promise* in writing.

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acknowledgment (under art. 180) be made.

under art. 180, sched. ii, Act XV, must be *given to the person entitled* to the money under the decree or order, or *to his agent.* Where no *money* is secured by the decree or order, it would seem that no acknowledgment will be of any avail under art. 180.

The *effect* of a good acknowledgment

The effect of a sufficient acknowledgment of liability, duly written and signed, is to give the plaintiff or applicant a new period of limitation according to the nature of the original liability,—that is, of the liability which exists at the date of the acknowledgment. If a judgment-debtor duly acknowledges the right of his opponent to a decree for the possession of land, and his own liability under such decree, the judgment-creditor will have a fresh period of three years (under art. 179) from the date of the acknowledgment, although the period for instituting a suit for possession is twelve years. The original liability here is the judgment-debtor's liability to proceedings in execution, not the extra-judicial liability to restore the land, which, since the decree, has merged in the liability under the decree.

from the date of its being *signed* or *given.*

The liability, whatever it may be, is, as if it were, recreated at the date when the acknowledgment is *signed* under sec. 19, or at the date when the acknowledgment is *given* to the judgment-creditor or his agent under art. 180. It is apprehended that the date of the acknowledgment under art. 180 is the date when it is *given* to the proper person, for until then it is not a valid acknowledgment under that article.[10]

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[10] See Joyne *v.* Hughes, 10 Ex., 430, cited in Brown on Limitation, p. 640.

A series of acknowledgments.

Where there are several acknowledgments, it is not necessary that they should *all* be made *within* the ordinary period calculated from the *ordinary starting point* of limitation. The first acknowledgment must, indeed, be made within that period, but the second may be made within the ordinary period computed from the date of the first acknowledgment, the third within the same period from the date of the second acknowledgment, and so on. The plaintiff or applicant will be in time if he brings his suit or makes his application within the ordinary period *from the date of the latest acknowledgment*, supposing there has been a continuous chain of such acknowledgments.[1]

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[1] See Mohesh *v.* Bussunt, I. L. R., 6 Calc., 340. Under art. 180, sched. ii, Act XV, it is perhaps not necessary that the acknowledgments should be made within the periods indicated above.—See p. 289, *supra*.

# LECTURE XI.

## PART-PAYMENTS, AND PAYMENTS OF INTEREST. EXTINGUISHMENT OF RIGHT BY LIMITATION.

Limitation Bills, 1855—1859, on the effect of payments — The English law as to payments — Under Act XIV payments did not renew the period of limitation, except in three cases — Amendments introduced by Acts IX and XV. Difference between payments of interest and part-payments — Receipt of the produce of mortgage land when a payment — Payments by one of several joint-debtors how far effective — Payment of *part* of a *legacy* not provided for — Payment of *part* of a debt, or of *interest* on a debt or legacy — What is a debt? — The principle on which the exception as to payments is based — *Interest* must be paid *as such*, *part-payments* need not — Appropriation of payment to interest by creditor not sufficient — A payment saves the *whole* claim — Payment need not be in money — Test of a good payment — Constructive payments — Sums *realized* by creditor, by sale of debtor's property, not sums *paid* — Payment *by* and *to* whom — Person liable to pay debt or legacy — Part-payment must be evidenced by the handwriting of the payor — The case of a payment, where there is more than one debt, considered — Appropriation of payments by creditor to *particular* debts sufficient — Other provisions of Act XV as to payments. Arts. 146 and 180 — The Indian Law Commissioners' views on the extinction and acquisition of rights by lapse of time — Act XIV silent on this subject — The provisions of Act IX — Section 28, Act XV, extinguishes rights to property — Right to legacies, debts or damages not extinguished by sec. 28 — Sec. 28 explained — Suit not an application — Possession not the *quasi*-possession of incorporeal rights — 'Rent' as an estate of inheritance is 'property' — Possession of moveables which are specifically recoverable is "possession of property" — Is a trademark 'property?' — Summary suits under sec. 9, Act I of 1877, not "suits for possession" — What are suits for possession of property, and what not — (Right extinguished when suit barred under arts. 46 and 47) — If the recovery of an interest in property *possession* within the meaning of sec. 28 — Right of private owners when extinguished — Right of Government when extinguished — Sec. 28 how far retrospective — The right extinguished is the right of a particular person or persons — Effect of the extinction of right — Where there has been *continuous* adverse possession — In the case of successive and independent trespassers — Continuous possession transfers the right and confers a good title — Person in whose favor limitation is running has a transmissible interest — Sec. 28 gives a good title against the party whose suit is barred — Title gained commensurate with interest extinguished — Title gained is sometimes gained on behalf of the landlord of the possessor — The doctrine of estoppel may affect the transfer of the right — Accessory rights extinguished with the principal.

Limitation Bills, 1855—1859, on

THE Section relating to acknowledgments in the Limitation Bills of 1855—1859 contained a provi-

the effect of payments.

sion by which an indirect admission,[2] by a part-payment on account of principal or interest, was allowed to renew the period of limitation, in the same way as a direct admission in writing that a debt or legacy or any part thereof was due. But on the motion of Mr. Peacock (now Sir Barnes Peacock) this provision was omitted. Mr. Peacock said:—"This part of the section is in accordance with the English law, but I object to the rule laid down by the English law respecting the effect of a part-payment. That rule proceeds on the principle that a part-payment operates as an acknowledgment from which a new promise to pay may be implied. It seems to me that in this country proof of part-payment should not have this effect."[3]

The English law as to payments.

Before the Statute 9 Geo. IV, c. 14, the decisions of the Courts had established two modes whereby a case might be taken out of the operation of the English Statute of Limitations.[4] These were, *first*, acknowledgments, or express promises to pay; and *secondly*, part-payments. The Statute of Geo. IV required that acknowledgments and promises to have that effect must be in writing, but it expressly reserved the

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[2] Generally speaking, payment is *a mode* of acknowledgment or admission. But sec. 40 of 3 & 4 Will. IV, c. 27 (like sec. 21 of Act IX of 1871, and sec. 20 of Act XV of 1877) treats payment as *distinct* from acknowledgment, while the Limitation Bills of 1855—1859, following sec. 5 of 3 & 4 Will. IV, c. 42, proposed that there should be not merely a payment, but an *admission or acknowledgment by payment*. See Brown, pp. 589, 590; and Whitby *v.* Lowe, 2 DeG. & J., 712.

[3] See the Proceedings of the Legislative Council of India for the year 1859, p. 58; and sec. 16 of the Bill of 1855; and sec. 19 of the Amended Bill of 1859.

[4] In modern times, Statutes of Limitation are construed more strictly, and Judges do not introduce exceptions to their operation.

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effect of part-payments. Again, the Statute 3 and 4 Will. IV, c. 42, sec. 5, expressly puts acknowledgments by writing, and acknowledgments by part-payment on the same footing, and gives a new period of limitation from the one, as well as from the other. The Statute 9 Geo. IV was extended to the Supreme Courts in the Presidency-towns by Act XIV of 1840.

Under Act XIV payments did not renew the period of limitation, except in three cases.

But sec. 4, Act XIV of 1859, expressly provided for the single case of an acknowledgment in writing, giving to that the same effect which it has by the English law, and impliedly excluded every other acknowledgment—an acknowledgment by part-payment, just as much as an acknowledgment by words only.[5] In *Gorachand Dutt* v. *Lokenath Dutt*,[6] it was held that a part-payment, even when it was proved by a memorandum signed by the defendant, was not such an acknowledgment in writing as was required by sec. 4, Act XIV of 1859. What sec. 4 required was an acknowledgment in writing that the debt or a part of it was due, not a mere acknowledgment of a fact from which it might be *presumed* that the debt or a part of it was unpaid or due.

There were, however, three specified cases in which Act XIV allowed payments on account to renew the period of limitation. These were, *first*, the case of suits for shares in joint family property (sec. 1, cl. 13); *secondly*, the case of suits in the Supreme Courts by mortgagees to recover immoveable properties mortgaged (sec. 6); and *thirdly*, the case of

[5] See Raja Icvara Das *v.* Richardson, 2 Mad., 84.

[6] 8 W. R., 335.

proceedings for enforcing the judgments, decrees or orders of the Supreme Courts (sec. 19).[7]

Amendments introduced by Acts IX and XV. Difference between payments of interest and part-payments.

Section 21 of Act IX of 1871 gave a new starting point in every case of payment (before the expiry of the period of limitation)[8] of *interest* on a *debt or legacy*. In case of *payment of part* of the principal of a *debt*, the same section of Act IX renewed the period of limitation, but only when the debt arose from a contract in writing, and the fact of payment appeared in the handwriting of the person making the same on the instrument, or in his own books, or in the books of the creditor.[9] Act XV of 1877 repealed the first half of this proviso, and extended the effect of part-payment to all debts whether arising out of a contract in *writing or not*. "Why," asked Mr. Wilkinson, the Recorder of Rangoon,

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[7] Sec. 6, Act XIV of 1859, corresponds to No. 149 of Act IX of 1871 and No. 146 of Act XV of 1877. Sec. 19, Act XIV, corresponds to No. 169 of Act IX and to No. 180 of Act XV.

[8] The "prescribed period" in sec. 21 (corresponding to sec. 20, Act XV) is the period of *limitation*, not the period of payment of the money advanced. See Ramsebuck *v.* Ramlall, I. L. R., 6 Calc., 815.

[9] An account stated is not a contract in writing within the meaning of this proviso. (Amritalall *v.* Maniklal, 10 Bom., 375.) A tradesman's bill is not such a contract. (Thompson's Act IX of 1871, p. 21.)

The reason of the proviso as to part-payments "will be found in the wholly different mode in which the inference of an unsatisfied debt is raised by the payment of *part* of the *principal* and the *interest* respectively." (See Savigny Sys., Vol. V, § 315; and Tippets *v.* Heane, 1 Cr. M. & R., 252, cited by Holloway, J., in Valia *v.* Vira, I. L. R., 1 Mad., 228.) A payment of money *as interest* is not liable to be construed as a payment in full discharge of the debt. The reason of the proviso in sec. 21 of Act IX was probably this:—If the debt did not arise out of a contract in writing, the amount of the debt might not be easily determined at the time of payment, and the debtor might easily contend that the payment was in *full discharge* of all that he admitted to be due. See Darby and Bosanquet, p. 72.

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"should a part-payment endorsed on a promissory note by the payor, or one admitted as such, in his own handwriting in the payee's bill-book, be entitled to more consideration than when a customer signs to a payment on account of principal in a shopkeeper's book or on the bill which he has made out in respect of articles that were purchased over the counter?" And the Legislature, in 1877, thought it would suffice to provide that the fact of part-payment should appear in the handwriting of the person making it. The ordinary case of a debtor making a part-payment by letter has thus been provided for.[10]

Receipt of the produce of mortgaged land when a payment.

Act IX of 1871 did not provide that the receipt of the produce of mortgaged land by a mortgagee in possession should be deemed a payment either of the principal or the interest of the mortgage debt. Where land was mortgaged to the plaintiff with possession for a term of years, and the mortgagor took a lease of the land from the plaintiff, some years after the execution of the mortgage, and paid rent under it even after the expiry of the mortgage term, it was held that the case being governed by Act IX of 1871, the payment of rent under an agreement *entirely independent* of the original mortgage could not be regarded as a payment of interest *as such*. The Court observed:—"It is pleaded that the suit is barred by limitation, to which the plaintiff replies that the receipt of rent was in fact a payment of interest, and that from the date of the payment of rent a new period of limitation is given for the recovery of the debt. Under the present law (Act XV of 1877) this may be so,

[10] See Proceedings of the Legislative Council of the 19th July 1877.

if it be held that payment of rent by the mortgagor is such a receipt of produce in virtue of a usufructuary mortgage as is deemed equivalent to a payment of interest, but this provision is not to be found in Act IX of 1871; and although, if the payment of rent had, as part of the original agreement or otherwise, been *agreed on as a provision for the interest* on the debt, we might have held it fell within the narrower terms of Act IX of 1871, yet, in the circumstances of the present case, it is impossible in our judgment to hold that the payment of rent under an agreement *entirely independent* of the original mortgage can be regarded as a payment of interest as such."[1]

Section 20, Act XV of 1877, expressly provides, that "where mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section." Independently of any express stipulation to that effect, the receipt of the rents and profits of the mortgaged land (supposing the mortgagee is in possession) is constructively a payment either of the principal or the interest, as the case may be. The mortgagee is supposed to pay, for (or as the agent of) the mortgagor, to *himself* as the creditor.[2] Where the receipt exceeds the amount of interest due, or is

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[1] Ummer *v.* Abdul, I. L. R., 2 Mad., 165. In Brocklehurst *v.* Jessop (7 Sim., 438) it was held in England, that the receipt of rents by an equitable mortgagee in possession might be taken, *primâ facie*, as a payment either of the principal or the interest of the debt, so as to prevent time running against his claim for the money. See Brown on Limitation, pp. 588, 662; and Banning, p. 77.

[2] Brown, p. 600. See Brocklehurst *v.* Jessop, cited above.

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otherwise a part-payment of the *principal*, it is apprehended that the fact of the rents and profits having been received, must, according to the general proviso to sec. 20, appear in the handwriting of the mortgagee or his agent.

Payments by one of several joint debtors how far effective.

Act IX of 1871, like 9 Geo. IV, c. 14, did not provide that *payments of interest* or *part-payments* by one of several partners or executors should not renew the period of limitation as against the *others*. But following sec. 14 of the Mercantile Law Amendment Act (19 & 20 Vict., c. 97) and the Massachusett's Revised Statutes, Act XV of 1877 extends to payments the rule applicable to *acknowledgments* of liability, and enacts that one of several joint contractors, partners, executors or mortgagees shall not be chargeable by reason of an acknowledgment *or a payment* made by another of them.[3]

Payment of *part* of a *legacy* not provided for.

As a legacy is not necessarily payable in full, but is liable to be reduced in proportion to the assets available for satisfying it, a payment by the executor of a part of a legacy does not imply an admission on the part of the executor that a larger amount is

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[3] See sec. 21, Act XV; Lecture X, p. 301; and Angell, para. 281. After the passing of 9 Geo. IV, c. 14, in Wyatt *v.* Hodson, it was held in England that, although an *acknowledgment* by one of several joint contractors could not prevent the *others* from taking advantage of the Statute of Limitation, the effect of a *payment* was not confined to the individual making it. And before the enactment of 9 Geo. IV, c. 14, even an *acknowledgment* by *one* of two joint contractors took the *whole* case out of the Statute of Limitation. See Whitecombe *v.* Whiting, and Angell, paras. 248 and 275. There is, however, a difference between an Acknowledgment and a Payment, "inasmuch as the latter is a benefit to *all* persons liable to the debt, as it relieves them from so much of their liability." Act XV of 1877, like 19 and 20 Vict., c. 97, does not attach any importance to this difference.

payable. This is probably the reason why Act IX of 1871 was, and Act XV of 1877 is, silent as to the effect of a payment of a part of a *legacy*.

Payment of *part* of a debt, or of *interest* on a debt or legacy.

The payment of *interest* on a "debt or legacy," or of a *part* of the principal of a 'debt,' if made before the suit is otherwise barred, gives the plaintiff a new period of limitation, according to the nature of the original liability.

What is a debt?

Servant's wages are a 'debt' within the meaning of this rule. Money due for goods sold is also a 'debt.'[4]

"In general," says Blackstone, "whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other (as in the case of a bond for payment of money, or an implied promise to pay for goods supplied, so much as they shall be reasonably worth), a *debt* is then said to exist between these parties; while, on the other hand, if the demand be of uncertain amount, as where an action is brought against a bailee for injury done through his negligence to an article committed to his care, it is described not as a *debt*, but as a claim for damages." The *debt*, however, is not a contract, but the result of a contract.[5] There is nothing in sec. 20, Act XV of 1877,

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[4] Nobin *v.* Kenny, 5 W. R., S. C. Ct., 3.

[5] See Stephen's Blackstone, Vol. II. Under English law, contracts are either simple contracts, or contracts by specialty or by matter of record. Judgment-debts are debts of record. In Kally Prosunno *v.* Heeralal, I. L. R., 2 Calc., 468, it was held, that although a sum due under a decree may sometimes be properly called a 'debt,' the provisoes to sec. 21 and article 169 of Act IX of 1871 shewed that, in that Act, 'debt' meant a liability to pay money for which a suit could be brought, and not one for which judgment had been obtained. The soundness of this ruling was doubted by Stuart, C. J., in I. L. R., 3 All., 247, F. B.

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to prevent its application to debts secured by a mortgage or a judgment.[6] Sections 20 and 21 expressly refer to mortgages and mortgagees.

*Debt* includes *liquidated* damages, but not unliquidated damages which cannot be ascertained except by the decision of a properly constituted Court. "Where a bond was conditioned for the replacing, by a certain time, of stock which the plaintiff had sold out for the defendant's benefit, and for the payment in the meantime of such sums as would be equal to the dividends of the stock, a payment on account of such last-mentioned sums was held not to have the effect of keeping alive the right of action for not replacing the stock, as the damages recoverable for such a breach were *unliquidated*."[7]

The principle on which the exception as to payments is based.

Payments, whether of interest or of part of the principal, are seldom made without deliberation. They are (generally speaking) *acknowledgments* of the subsistence of the debt,—not by words but by *conduct*.[8] The principle upon which a part-payment in England takes a case out of the Statute of James I is, that it admits a greater debt to be due at the time

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And now, that the proviso as to part-payments has been considerably modified, it is apprehended that sec. 20 of Act XV applies to judgment-debts as well as to other debts. The proviso to art. 180, Act XV, however, still applies to *some* judgment-debts.

[6] As to judgment-debts see the preceding note. As to mortgage-debts, it is observable, that, under art. 146, Act XV, in suits in Courts established by Royal Charter in the exercise of its ordinary original civil jurisdiction, to recover from the mortgagor the *possession* of immoveable property mortgaged, the last payment of interest or part-payment is the starting point of limitation. As to the effect of payments in suits in *other* Courts for *possession* of the mortgaged property, see 16 W. R., P. C., 33, 35. In suits to recover the *debt* or *charge* in *any* Court, payments under sec. 20 will give the plaintiff a new starting point.

[7] Darby and Bosanquet, p. 106. [8] Brown, p. 587.

of the part-payment.[9] The payment of interest *qua* interest, is evidence of the existence of the debt, and a payment made *as part-payment* raises the implication that the residue of the principal sum is due. The Indian Legislature, while expressly requiring that the interest paid must be paid *as interest*, does not enact that payments of parts of the principal sum due must be shewn to be payments made *as part-payments*.

*Interest* must be paid *as such, part-payments* need not.

It would seem that, under sec. 20, Act XV of 1877, if the fact of payment of a part of the principal of a debt appeared in the handwriting of the debtor or his agent, and the period of limitation had not expired at the date of the payment, the creditor would be entitled to a fresh period of limitation, although the debtor *intended* the payment as a payment of the whole debt *in full*. The statutory exception in 3 and 4 Will. IV, c. 42, sec. 5, requires not merely a payment, but an *acknowledgment by payment*. The Indian Act does not require the implication of a *promise* or even an *acknowledgment* by payment.

In the case of payment of *interest*,[10] although it is

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[9] Tippets *v.* Heane, 1 C. M. & R., 252. From the admission of the existence of the debt the law raises an implication of a *promise* to pay, and where this implication is rebutted by the circumstances of the case, the payment is not sufficient to take the case out of the Statute of James I.

[10] 'Interest' means not merely that which is reserved by the original *tamasook*, note, or mortgage, as recompense for the use of the money advanced, and payable *before* the principal amount becomes due, but all interest recoverable for the non-payment of money *already* due. "Interest, in its ordinary sense," says Markby, J., "means something paid for money overdue." (Ram Chunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 301.) *Primâ facie*, a debt which carries interest appears to import a

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not necessary that the fact of the payment should appear in the handwriting of the person making the same, it must be shewn that the payment was *qua* interest. It has been held[1] that where payments are made in reduction of a general balance of accounts, without any intimation by the debtor that they are on account of interest, such payments are not payments of interest *as such* within the meaning of sec. 20. Appropriation of the payment to interest by the *creditor* is not sufficient. Interest for the delay of payment *post diem*, in the *absence* of an express or implied *contract*, is not interest properly so called. It is payable only *as damages* for breach of contract.[2]

Appropriation of payment to interest by creditor not sufficient.

Payment of interest on a note which does not carry interest on the face of it, and on which no demand is proved to have been made, is sufficient to take the case out of the English Statute of Limitation. It is apprehended that, under the Indian law, if a debt properly carries interest, so that the principal and interest constitute one demand or claim, part-payments *or* payments of interest will keep alive the *whole* claim to principal *and* interest.[3]

A payment saves the *whole* claim.

The payment of interest or part of the principal need not necessarily be made in actual money.

Payment need not be in money.

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debt already due. (Angell, sec. 95.) Payment of interest *before* the principal sum becomes due is of little importance for the purposes of sec. 20, Act XV of 1877. In common parlance, *interest* includes *damages* for non-payment. See Brown, pp. 669, 670; Forsyth *v.* Bristowe, 8 Ex., 716.

[1] Hanmantmal *v.* Rambabai, I. L. R., 3 Bomb., 198. See also Naronji *v.* Mugnirum, I. L. R., 6 Bomb., 103, 106; and Surju *v.* Khawhish, I. L. R., 4 All., 512, 514.

[2] Cooke *v.* Fowler cited at p. 90 of 25 W. R. But the payment of such damages, *as interest*, will probably keep alive the debt.

[3] See Darby and Bosanquet, pp. 70, 71; Banning, pp. 65, 66.

Anything received which the parties *agree* should go to reduce the debt or pay the interest, is a payment sufficient to take the debt out of the statute.[4] Payment in *goods*, or even affording maintenance to the creditor's child, may, upon agreement, be a good payment. So, upon agreement between the parties, the payment by the debtor of money owing by the creditor to a third person may be a good payment.[5]

Test of a good payment.

The correct test as to what transactions between the debtor and creditor are equivalent to payments for the purpose of avoiding the statute is laid down in *Maber* v. *Maber* (L. R., 2 Exch., 153). All the Judges of the Court of Exchequer seem to have agreed that any facts which would prove a plea of payment, if the debtor were subsequently sued for the sum alleged to be paid, would be sufficient to bar the statute.[6]

Constructive payments.

It has been held in England that where a tenant for life, of an estate subject to a charge, is entitled to the interest of the charge, he will be *deemed* to have kept down and paid the interest, and thus preserve the right to the capital of the charge.[7] But as one particular case of *constructive* payment, *viz.*, that relating to the receipt of produce of mortgaged land, is expressly mentioned in sec. 20, Act XV of 1877, it may be said that *other* cases of constructive payments are impliedly excluded.

Sums *realized* by

It has been held that sums not voluntarily paid, but

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[4] See Banning, p. 72; Hooper *v.* Stevens, 4 A. and E., 71; Bodger *v.* Arch, 10 Exch., 333. As to part-payments by bills, see Banning, p. 74.

[5] Brown, p. 588; Banning, p. 73.

[6] Darby and Bosanquet, p. 80; Banning, p .73.

[7] Brown, p. 588; Burrowes *v.* Gore, 6 H. L. C., 907.

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creditor, by sale of debtor's property, not sums *paid*.

realized by a private sale of the debtor's goods in the possession of the creditor, or by an execution-sale of the defendant's property, are not sums *paid* by the debtor or the defendant within the meaning of the Act.[8]

Payment *by* and *to* whom.

It is necessary that the payment should be made by the "person liable to pay," or his agent duly authorized in this behalf. A payment by a mere stranger without the knowledge of the debtor, or by an agent after the termination, or beyond the scope, of his authority,[9] is of no avail. The payment may be made to the creditor or to his agent, or by agreement between the parties to any person on his account. Such agreement may be express or implied. The course of dealing between the parties, or even subsequent ratification, may be sufficient to prove the agreement.[10] Section 20, Act XV, it may be observed, expressly states *by* whom the payment is to be made, but it says nothing as to the person *to* whom the payment must be made. (Cf. art. 180, Sched. II.)

Person liable to pay debt or legacy.

In the case of a debt, the "person liable to pay" is the original debtor, or any other person who derives his liability from such debtor, or who for the time being represents his estate.[1] Payment of interest by a tenant for life has been held to be

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[8] See Rughoonath *v.* Ranee Shiromonee, 24 W. R., 20; Ramchandra *v.* Devba, I. L. R., 6 Bomb., 626; Fuckoruddeen *v.* Mohima, I. L. R., 4 Calc., 529, 531; Narroaji *v.* Mugniram, I. L. R., 6 Bomb., 103. In this last case it was held that moneys received (by a commission agent) by surplus proceeds of goods (belonging to his customer) sold in England, subsequent to an adjustment of accounts between the parties, were not *payments* within the meaning of sec. 20, Act XV of 1877.

[9] As to duly authorized agents, see pp. 303 *et seq.*, *supra*.

[10] Darby and Bosanquet, p. 77.

[1] See Brown, p. 613; Banning, p. 186; Darby and Bosanquet, p. 91.

sufficient to preserve a debt, charged upon the land, against the remainderman.[2] In the case of a legacy, the "person liable to pay" is primarily the executor or administrator.

Part-payment must be evidenced by the handwriting of the payor.

Payment of *interest* may be proved by *any* legal evidence,[3] but the fact of payment of a *part of the principal* of a debt must appear in the *handwriting* of the person making the same, *viz.* the debtor or his duly authorized agent. It has been held by the Madras High Court, that where there is a writing setting out the fact of payment, and the debtor affixes his mark or signature thereto, he adopts the writing and makes it his own, and by his signature causes the fact to appear in his own *handwriting*.[4] This interpretation is in accordance with the probable intention of the Legislature, but the language of the proviso, strictly construed, leads to a different conclusion. Where the memorandum of payment is in the *actual* handwriting of the debtor or his agent, it is not necessary that it should be *marked* or *signed* by the payor. If the writing is not forthcoming,

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[2] Brown, p. 612; Burrowes *v.* Gore, 6 H. L. C., 907.

Payment of interest by the executor of the debtor would keep alive the *debt* even against legatees who are bound to refund under sec. 321 of Act X of 1865. The suit to compel a refund must, however, be brought within the time allowed by art. 43 of Act XV of 1877. See Darby and Bosanquet, p. 86.

[3] When the *creditor* charges himself with receipt of *interest* by way of endorsement on a bond, if the entry is proved to have been written before the expiry of the period of limitation, when its effect was clearly in contradiction to the writer's pecuniary interest, such endorsement or entry is receivable as evidence of the payment after the death of the writer, under sec. 32, cl. 3, of the Indian Evidence Act, 1872. See Rose *v.* Bryant, and Searle *v.* Lord Barrington, cited in Norton's Law of Evidence, 9th Ed., pp. 182, 183.

[4] Ellappa *v.* Annamaloi, I. L. R., 7 Mad., 76, 79.

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secondary evidence of it will be of no use. The payor's written memorandum of payment is the only evidence of part-payment which the Court can look to for the purposes of sec. 20.

The case of a payment, where there is more than one debt, considered.

The *identity* of the debt on account of which a payment is made, like the *payment* of interest, may be proved by *any* legal evidence. "If," say Messrs. Darby and Bosanquet,[5] "more than one debt is shown to have been due at the time of the payment either of principal or interest relied on, a question arises whether such payment was made on account of all the debts, or was appropriated to any one or more, and if so, to which of them. This appropriation need not be proved by any express declaration of the debtor at the time of payment, but any expressions used by him, either before or after that time, or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts, or was made on account of all the debts collectively, will be sufficient for this purpose. It must be observed that if the evidence shows that the payment is made on account of all, it will prevent any of the debts being barred by statute."

Appropriation of payments by creditors to *particular* debts sufficient.

The appropriation of a payment to a particular debt which a *creditor* makes, where none is made by the debtor,[6] may not (in the absence of proof of the *debtor's intention*) raise the implied promise to

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[5] Darby and Bosanquet, p. 73. See also Banning, pp. 68, 69.

[6] See sec. 60, Indian Contract Act, 1872. The appropriation of a payment to a *barred* debt will not revive the debt, for the payment must, under sec. 20, Act XV of 1877, be made *before* the expiry of the period of limitation.

pay the residue which the English law (in cases governed by 21 James I, c. 16) requires. But as payments of parts of the principal amount are, by sec. 20 of Act XV, sufficient to keep alive the debt, irrespective of any promise or acknowledgment, it is apprehended that a payment appropriated by the creditor to a particular debt or debts, under the power given by sec. 60 of the Indian Contract Act, is sufficient to take that debt or debts out of the statute, if such debt or debts were not barred by limitation at the date of the payment.[7] Where there are two debts *entirely distinct* from each other, a payment *not specifically appropriated* as payment to either is not sufficient to keep alive either of the debts.[8]

Other provisions of Act XV as to payments. Arts. 146 and 180.

Besides the provisions of sec. 20 for *renewing* the *ordinary* period of limitation by a payment in cases connected with the recovery of *debts* and *legacies*, Act XV of 1877, in art. 146, gives the mortgagee suing for *possession* of mortgaged immoveable property, before a Court established by Royal Charter in the exercise of its ordinary civil jurisdiction, a *new starting point* from the time of a *payment* on account of the mortgage debt. Under this article, the payment entitles the mortgagee not merely to a fresh period of twelve years, but to a *longer* period, *viz.*, thirty years from the date of the payment.[9]

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[7] Compare Darby and Bosanquet, pp. 74, 75; Banning, pp. 69, 70; Nash *v.* Hodgson, 6 D. M. and G., 474. The creditor, in appropriating the payment, might be *deemed* to be acting as the agent of the debtor, even if an implied *promise* to pay on the part of the debtor were necessary.

[8] Walker *v.* Butler, 6 E. and B., 506; and Burn *v.* Boulton, 2 C. B., 485. Banning, p. 69; Darby and Bosanquet, p. 73.

[9] Under sec. 6 of Act XIV of 1859, a payment in similar cases simply *renewed* the ordinary period of limitation. Under Act IX of

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The provision in the case of a payment in art. 180 of Act XV would seem to be unnecessary if the word 'debt' in sec. 20 includes a judgment-debt. But some effect may be given to these provisions as they stand, by holding that a payment under art. 180 must be made *to* the person entitled to the money secured by the judgment or to his agent, while a payment under sec. 20 is sufficient, if it is made on account of the debt without taking into consideration the question *to* whom the payment is made. Thus, it may be held (as in *Clark* v. *Hooper*, 10 Bing., 480) that, under sec. 20, a payment to a person *acting as, and supposed* to be, the rightful administrator of an intestate creditor, is a good payment to bar the statute in favor of the person who subsequently becomes his *proper* legal representative.

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Having reviewed the general rules and exceptions laid down by the Limitation Act, I shall next consider the *effect* of limitation on the substantive rights affected by it.

A brief history of statutory and judiciary law on this subject will be found in Lectures I and III.[10]

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1871, art. 149, such a payment gave the plaintiff sixty years from the date of payment. The only reason that can be assigned for giving a *longer* period is, that where some part of the principal or interest has been paid, there is not likely to be any dispute as to the original transaction of which payment operates as an acknowledgment. See Ram Chunder v. Juggutmonmohiny, I. L. R., 4 Calc., 283, 296, 303; 3 C. L. R., 336, 356. Under the English law (7 Will. IV, and 1 Vict., c. 28) the ordinary period is *renewed* by a payment.

[10] See Lecture III, pp. 64, 65, 69, 70; and Lecture I, pp. 13, 15 and 17.

The following sections of the Bill drafted by the Indian Law Commissioners in 1841-1842, shew that they proposed that the right to *legacies*, *debts* and *damages* should be *extinguished* by limitation, and that the right to *property* should not only be extinguished, but *acquired* by adverse possession for the prescribed period :—

The Indian Law Commissioners' views on the extinction and acquisition of rights by lapse of time.

"Section 1. It is hereby enacted, that, subject to the exception hereinafter mentioned, a *title* by prescription shall be *acquired* in respect of *property*, moveable and immoveable, and hereditary offices, by uninterrupted *possession*, mediate or immediate, as proprietor, for six years, in the case of moveable property, and for twelve years in the case of immoveable property and hereditary offices; provided that if any of her title be proved, the possession shall have been adverse thereto; and provided[1] that nothing herein contained shall be construed to affect any right arising from possession of moveable property now recognized by law."

"Section 25. And it is hereby enacted, that when, by the provisions of this Act, a person is *barred* from bringing a *suit* for the recovery of any *legacy*, *debt* or *damages*, his *right* to the legacy, debt or damages, for which a suit might have been brought by him but for those provisions, shall be *extinguished*, unless such right is secured by some mortgage, pledge or lien."[2]

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[1] The reason of this last proviso was given by the Commissioners in the following words: "As the mere fact of possession already gives a right in respect to moveable property until an adverse title shall be proved, and sometimes against an adverse title, we have introduced a proviso that the proposed prescription shall not be construed to affect rights now arising from periods of negative prescription." For the present law, see sec. 108 of the Contract Act.

[2] It may be added that the Indian Law Commissioners in 1841-42, and Sir James Colvile in 1855-59, proposed rules for the acquisition and extinction of *easements* also. See Lecture XII.

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Act XIV silent on this subject.

The Bills of 1855 and 1859 contained similar provisions.[3] But the Limitation *Act* of 1859 was wholly silent as to acquisitive and extinctive prescription. Notwithstanding this silence, it was held by the Courts that *easements*[4] could be *acquired* by long enjoyment; and the *right* to *immoveable property*[5] *extinguished* by limitation.

The provisions of Act IX.

Act IX of 1871 (besides laying down rules for the direct *acquisition* of rights to *easements*) provided for the *extinguishment* of rights to *land* and *hereditary offices*. (See sec. 29, Act IX of 1871.)

Sec. 28, Act XV, extinguishes rights to property.

And now sec. 28, Act XV of 1877, extends[6] the rule of extinctive prescription to *moveable* property. The section runs as follows:—"At the determination of the period hereby limited to any person for instituting a suit for possession of *any property*, his right to such property shall be extinguished."

Hereditary offices, which are often treated[7] as immoveable property in this country, are not expressly

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[3] See secs. 1, 2, and 23 of the Bill of 1855; and secs. 1, 2, and 26 of the Bill of 1859. Section 23 of the first Bill, and sec. 26 of the Amended Bill, further provided that the *right* to bring a *suit* for the recovery of a *debt* or *legacy* (but not the right to sue for *damages*) might be *revived* by an admission by payment or written acknowledgment.

[4] See p. 69 (note 5), *supra*. [5] See pp. 3, 14, and 42, *supra*.

[6] Ram Chunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 297. Sec. 34 of 3 and 4 Will. IV, c. 27, corresponds to sec. 29, Act IX, and sec. 28, Act XV. Section 34 of the English Statute runs as follows: "And be it further enacted, that, at the determination of the period limited by this Act to any person for . . . bringing any . . . action or suit, the right and title of such person to the land, rent or advowson for the recovery whereof such . . . action or suit . . . might have been . . . brought within such period, shall be extinguished." By sec. 1 of the Statute, 'land' includes an interest in a corporeal hereditament. Sec. 34 of the English Statute, 1871, does not apply to moveable property.

[7] See Chhagganlal *v.* Bapubhai, I. L. R., 5 Bomb., 68, 70.

mentioned, probably because, whether rights to such offices are *immoveable* property or not, they are certainly included in the term 'property.'

Right to legacies, debts or damages not extinguished by sec. 28.

The law does not say that the right to pecuniary legacies, debts or damages shall be extinguished by the mere fact that the suit to recover them has been barred by limitation. We have already seen that when limitation bars the remedy it may leave the right *in esse*.[8]

Sec. 28 explained.

Section 28 of Act XV expressly provides, that when a person's *suit for possession* of *property* is barred by limitation under *the Act, his right* to such property shall be *extinguished*.

Suit not an application.

An *application*[9] for possession of property may be barred by limitation, but the applicant's right to the property is not extinguished by sec. 28. A suit for possession of property may be barred by efflux of time under a *special or local law*,[10] but the right in such a case is not extinguished by sec. 28.

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[8] As to *debts* not being *extinguished* by limitation, see pp. 3 and 4, *supra*. As to the right to recover unliquidated *damages*, see p. 15, *supra*. The Indian Law Commissioners and Sir James Colvile *proposed* that the right to *damages* should be *extinguished* by limitation, and that the right to sue for *damages* should not be *revived* by payment or written acknowledgment. See the Bills referred to in note (2).

As to the right to immoveable property being *practically extinguished* by limitation in favor of the party in possession, see p. 3 (note), pp. 13, 14 and p. 42 (note 10). The Madras High Court, however, held that Act XIV of 1859 did not extinguish the right. See Doe *v.* Kuppu Pillai, 1 Mad., 89.

As to Bombay Reg. V of 1827 and the effect of Act XIV in the Bombay Presidency, see p. 65, note (8), *supra*.

[9] Such as, an application under sec. 335 of the Civil Procedure Code, and art. 167 of Act XV of 1877.

[10] Such as a suit to recover the occupancy of any land, farm or tenure from which a ryot, farmer, or tenant has been illegally ejected. The

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Possession, not the *quasi*-possession of incorporeal rights.

The *quasi*-possession of an *easement*[1] is not the "possession of property" within the purview of sec. 28 of Act XV of 1877 (or sec. 29 of Act IX of 1871). An easement is hardly an interest in land,[2] and far less a *proprietary* interest. Besides, the *extinction* of easements is separately provided for by sec. 47, Act V of 1882. Section 28 of Act XV would, therefore, seem to refer mainly to corporeal property, moveable and immoveable.

'Rent' as an estate of inheritance is 'property.'

But many things which the law of England would class as "incorporeal hereditaments" fall within the category of "immoveable property." Thus *rent* as an *estate* of inheritance distinct from the land, and as distinguished from the conventional equivalent receivable under a lease, though an incorporeal hereditament, is such a proprietary interest or estate that a suit for 'rent' in *this* sense is a suit for "possession of property" within the meaning of sec. 28.[3] Where there are two persons, each of whom claims an estate in the 'rent' adverse to the other, or where the person in occupation of the land claims to hold it "free from rent," and a suit for such 'rent' is barred by limitation, the right to the 'rent' is extinguished by sec. 28. If *A* claims as against *B* to be the *malik* to whom the rent of a putnee or

period of limitation, one year, prescribed by sec. 27, Act VIII of 1869, B.C., is not a "period *hereby* limited" within the meaning of sec. 28, Act XV.

[1] Easements, however, *are extinguished* by disuse under sec. 47, Act V of 1882, in provinces to which the Act applies.

[2] Gale, p. 6. But see p. 202, note (7), *supra*, as to the meaning of "immoveable property" under Act XIV of 1859; and Sri Raja *v.* Sri Raja, I. L. R., 5 Mad., 253, 255. An easement *is* such an interest under the Statute of Frauds. See Lecture XII.

[3] See Abhoy *v.* Kally, I. L. R., 5 Calc., 949, 952. Darby and Bosanquet, p. 207.

other permanent tenure held by *C* is payable, and *B* proves that he has, for more than twelve years, received the rent from *C* adversely to *A*, *A's* suit against *B* for the 'rent' is barred by limitation, and his right to the 'rent' extinguished by the section under consideration. As between landlord and tenant, if a tenancy is proved or admitted, non-payment of rent for twelve years or more does not extinguish the landlord's right, and as the liability to pay rent recurs after fixed intervals, he may sue for such *arrears* of rent as are not barred by limitation.[4] But if no rent has been originally assessed on the land, and the person in occupation holds it rent-free for more than twelve years, the zemindar's suit for resumption or assessment being barred by art. 130, sched. ii, Act XV of 1877, his right to the 'rent' is *extinguished*[5] by sec. 28.

Possession of move-

Besides suits for possession of immoveable pro-

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[4] Poresh *v.* Kashi, I. L. R., 4 Calc., 661; Premsukh *v.* Bhupia, I. L. R., 2 All., 517, F. B.; Tiruchurna *v.* Sanguvien, I. L. R., 3 Mad., 119.

[5] See Abhoy *v.* Kally, I. L. R., 5 Calc., 949; Keval *v.* The Talukdari Settlement Officer, I. L. R., 1 Bomb., 586; Ali Bux *v.* Roop, 2 N. W. P., 106.

Where it is not necessary for the plaintiff to establish his *title* to a periodically recurring right (*e. g.*, *malikana huqqs*, fees attached to hereditary offices, &c.), as where he has already obtained a declaratory decree on the subject against the defendant, there is nothing to restrict the plaintiff's right to recover the *arrears* falling due within the period of limitation. But when the plaintiff has (as he generally has) to establish his title before he can obtain a decree for arrears, he cannot be allowed to recover such arrears, if he come into Court too late to establish his *title*. (Chhaganlal *v.* Bapubhai, I. L. R., 5 Bomb., 68, 71.) Similarly, if the previous suit for assessment of rent is barred, the suit for rent must also be barred. Abhoy *v.* Kally, I. L. R., 5 Calc., 949, 952.

When there is a *covenant* to pay a rent charge, then, although the rent charge may be extinguished so far as the *and* is concerned, the subject-matter of the *covenant* is not destroyed thereby. (Darby and Bosanquet, p. 388.)

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perty, suits for possession of moveables which may be *specifically* recovered,[6] are "suits for *possession* of property" within the meaning of the section. A suit for the recovery of *money* is not a suit for "possession of property." But a suit for the *specific* recovery of a particular article of moveable property is a suit for the *possession* of such property.

ables which are specifically recoverable, is "possession of property."

Is a trademark property?

Though a trademark is *property* within the meaning of sec. 54 of the Specific Relief Act, it is not *property* within the meaning of every Act or Regulation.[7]

Summary suits under sec. 9, Act I of 1877, not "suits for possession."

Section 28 of Act XV cannot apply to suits to recover possession of immoveable property under sec. 9 of the Specific Relief Act. A person dispossessed, without his consent, of immoveable property otherwise than in due course of law, may omit to sue to recover possession thereof for six months from the date of the dispossession, but his right to the property is not extinguished thereby. The Specific Relief Act *expressly* provides that nothing in sec. 9 (which, as well as art. 3, sched. ii of Act XV of 1877, prescribes the six months' limitation for such a suit) shall bar any person from suing to establish his title to the property and to recover possession thereof. The object of sec. 9 of the Specific Relief Act (which corresponds with sec. 15 of Act XIV of 1859) is to provide a special remedy for a particular grievance. It puts an additional restraint upon illegal dispossession, with a view to prevent the disseizor from shifting from himself

[6] See secs. 8—11 of the Specific Relief Act.

[7] English lawyers now treat the sole right to a trademark as *property*. Broom and Hadley, Vol. II, 585; 11 H. L., 523.

the onus of proof to the party unlawfully dispossessed.[8] If a suit is brought under sec. 9 within six months, even the rightful owner of the land (if he happens to be the disseizor) is precluded from showing his *title*.[9] But it is not necessary to sue to *set aside* a decree passed under sec. 9. If a decree for possession on the strength of plaintiff's *title* be subsequently obtained, the effect of the decree under sec. 9 would by itself cease and determine.[10] A suit to establish *title* may be brought within the *ordinary* period of twelve years,[1] and an ordinary suit to recover possession is not barred at the expiration of six months.[2] Although there are no *words* in sec. 28, Act XV, to shew that a suit to recover possession of immoveable property under art. 3, sched. ii, is not a "suit for possession of property" within the meaning of the section, it could not have been *intended* by the Legislature that a summary suit for possession under art. 3, sched. ii, should, for the purposes of the section, be treated as a regular suit for possession.

What are suits for possession

A suit for the recovery (of possession) of a wife under art. 34 is *not* a suit for possession of *property*,

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[8] Kalee *v.* Adoo, 9 W. R., 602. The object of the section is "to discourage people from taking the law into their own hands, however good their title may be." Krishnarav *v.* Vasudev, I. L. R., 8 Bomb., 371, 375.

[9] Khajah Enaetoollah *v.* Kishen Soonder, 8 W. R., 386, 389.

[10] Sreenath *v.* Bishonath, 6 W. R., 268.

[1] See sec. 15, Act XIV of 1859; Eshan *v.* Zumuduroonissa, 17 W. R., 468.

[2] There is a conflict of opinion as to the evidence of *title* required in a suit for ejectment brought *after* the six months allowed by art. 3 Act XV. See 8 W. R., 386; 9 W. R., 602; and 9 C. L. R., 164; *contra*, 7 Bomb., 82; I. L. R., 9 Calc., 39; 11 C. L. R., 393. According to the first three rulings, the general law on this matter is *not* affected by the provision of sec. 15, Act XIV of 1859. See also I. L. R., 8 Bomb., 371.

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and sec. 28 cannot extinguish the husband's marital rights.

of property, and what not.

A pre-emption suit is virtually a suit for possession.[3] But a suit to enforce a lien under art. 111, or a suit to enforce payment of money charged upon immoveable property under art. 132, is not, it is apprehended, a suit for *possession* of property.

A suit under art. 44 by a ward who has attained majority, merely to set aside a sale by his guardian, is not a suit for *possession;* but a suit under art. 94 by a person who has recovered his sanity, for property conveyed during his insanity, *is* a suit for *possession.*

A suit to establish *right* to the present possession of property under art. 11 is not a suit for *possession.*[4]

(Right extinguished when suit barred under arts. 46 and 47.)

A suit under art. 46 to recover property comprised in a survey award, or under art. 47 to recover property comprised in an order respecting possession, made under the Code of Criminal Procedure, is a suit for possession of property, and it is apprehended that possession for three years *under* such award or order gives the party in possession a title as against persons bound by such award or order. Under the Regulations and Act XIV of 1859, such possession for three years did *not* create a title by prescription.[5] Possession for three years, *notwithstanding* such award or order, does not give any title to the party in

[3] Sec. 214, Civil Procedure Code.

[4] If the one year's limitation practically extinguishes the right to the property, it does so independently of sec 28. See. p. 103. *supra.*

[5] Wise *v.* Ameerunnissa, 6 C. L. R., 249, P. C. See also Mohim *v.* Rajcoomar, 10 W. R., 22. Although the award or order does not determine the *title* to the property, sec. 28, Act XV, would seem to extinguish it after the prescribed period.

possession, for the suit to recover possession by the person in whose *favor* the award or order is made is not barred by the three years' limitation.

A suit for *specific* moveable property under art. 48 or art. 49 is a suit for possession of property, but a suit against an agent under art. 89 for moveable property not accounted for, is *not* necessarily a suit for *possession* of property.[6]

We have already observed that a suit for possession of an hereditary office, under art. 124, is a suit for possession of *property*.

A suit to enforce a right to share in joint family property, under art. 127, is also a suit for *possession* of property.[7] It has been already observed that a suit for the resumption or assessment of rent-free land under art. 130 is a suit for *possession of property*.

Suits under arts. 133 to 145 are suits for possession of property, but when a mortgagee's suit for possession *as mortgagee* is barred by limitation under art. 135, his right to foreclose the mortgage, or to recover the property as *absolute owner*, is not thereby extinguished.[8] The same remark applies to similar suits in Courts established by Royal Charter under art. 146.

A suit for foreclosure under art. 147, though it may lead to the payment of the mortgage money, is not a suit to recover *money*. It is strictly a suit to

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[6] If a *particular article* of moveable property is held by a person as the agent of the true owner, it may be *specifically* recovered. Sec. 11, Act I of 1877.

[7] See Sitaram *v.* Khanderav, I. L. R., 1 Bomb., 286.

[8] See Ghinarain *v.* Ram Monaruth, 7 C. L. R., 580. See also Lord Selborne's judgment in Pugh *v.* Heath, 6 Q. B. D., 345; and 7 App. Cas., 235.

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exclude a right given to the mortgagor, and according to Lord St. Leonards, it is a suit to *recover property.*[9]

A suit by a mortgagee for sale under art. 147, though a "suit for land," is not a suit for *possession* of land.

A suit to redeem a mortgage under art 148, is not necessarily a suit for possession of property.

Is the recovery of an interest in property *possession* within the meaning of sec. 28.

It may be here observed, that although some of the suits mentioned above are not, *strictly* speaking, suits for *possession of property*, such suits were covered by the general provisions of sec. 1, cl. 12, Act XIV of 1859, which applied to "suits for the *recovery* of an *interest* in immoveable property." Rights to such *interests* were *practically* extinguished by lapse of time under Act XIV of 1859. If the words "suit for possession of any property" in sec. 28, Act XV, be interpreted to include "suit for the recovery of an interest in property" when the property is immoveable, the section will exactly correspond to the English law on the subject, and to the law administered in Bengal before Act IX of 1871 was passed.

Right of private owners when extinguished.

As between *private* owners contesting *inter se* the title to land, the law has (in general) established a limitation of *twelve* years; after that time, it declares not simply that the remedy is barred, but that the title is extinguished. The owner's cause of action or his right cannot be kept alive longer than the ordinary

[9] Darby and Bosanquet, pp. 115, 116; Wrixon *v.* Vira, 3 Dru. and War., 104. A large number of cases on the meaning of the words "suit for land" in the Civil Procedure Code are referred to in the argument of Counsel in Delhi and London Bank *v.* Wordie, I. L. R., 1 Calc., 249.

period of limitation by the expedient of inducing the Government or the Secretary of State for India in Council to make common cause with him.[10]

Right of Government when extinguished.

Where the Government has a right to the *possession* of land or other property, and no suit is brought within *sixty years* (under art. 149) to enforce such right, the right of the Government is extinguished under sec. 28.

Sec. 28 how far retrospective.

Section 28 of Act XV of 1877 has introduced a *new* rule as regards the extinction of right to *moveable* property.[1] It is apprehended that if the period of limitation for instituting a suit for possession of such property expired *before* Act XV came into operation (and the party in possession quitted possession before that date), the *right* to the property would not be affected thereby.[2] But if the party in possession has continued to be in possession at the commencement of the Act, and the rightful owner's suit is barred by limitation under the Act, his right to the property is also *extinguished* by the Act. It is not necessary that the period of limitation should *begin* to run *after* the Act came into force,—it is sufficient if the period *ends* after that date.

As regards moveables (in the case of a conflict of laws) the term of the prescription, and the complete

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[10] Gunga Gobind Mundle *v.* The Collector of the 24-Pergunnahs, 7 W. R., P. C., 21. The title of the Government in this case resembled a seigniory.

[1] I. L. R., 4 Calc., 297. Justice Markby was of opinion that the right to moveables and debts was extinguished by limitation even under the old law. See Markby's Elements of Law, p. 213; Krishna *v.* Okhilmoni, I. L. R., 3 Calc., 331, 333. For the opposite view, see I. L. R., 6 Calc., 355.

[2] On the retrospective operation of the analogous provision of 3 and 4 Will. IV, c. 27, see Banning, pp. 110 and 111.

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acquisition of the property must be judged by the law of the *place* at which the thing is *last* found, because it is only at the expiry of the *whole* period that the change of property takes place. When property has been acquired by prescription in one country, it must be recognized in every other country.[3]

The right extinguished is the right of a particular person or persons.

The right of the *particular* person, whose suit for possession of property (moveable or immoveable) is barred by limitation, is extinguished by sec. 28. If the right of a Hindu widow, or a tenant for life, is extinguished by limitation, it does not follow that the right of the persons entitled in *reversion* or *remainder* shall be so extinguished. So again, when one of several claimants entitled to the present possession of property is barred by limitation, it does not follow that the other claimants shall be also barred, or that *their* rights shall be extinguished by sec. 28.

Effect of the extinction of right.

When the right of a person (whose suit for possession of any property is barred by efflux of time) is extinguished, he is a wrong-doer if he attempts to exercise acts of ownership over the property as against any person who happens to be in possession. Section 28 does not *say* that the right extinguished by it shall be transferred to the possessor, but there can be no doubt that continuous possession for the prescribed period *practically* conveys the property to the party in such possession.[4] (See the Preamble.)

Where there has been *continuous* adverse possession.

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[3] Westlake, pp. 160-161 ; see p. 43 (note), *supra*.

[4] Gunga Gobind Mundle *v.* The Collector of the 24-Pergunnahs, 7 W. R., P. C., 21, 23, cited in I. L. R., 3 Calc., 224. See pp. 4, 5. *supra*.

" It has been said that the effect of the Statute (3 and 4 Will. IV, c. 27, sec. 34) is to execute a conveyance to the party whose possession is a bar,

Where possession for the prescribed period has not been continuous, as, where there are *several* possessors holding adversely to the rightful owner and independently of one another, it is more difficult to say in whose favor the statutory conveyance is made.[5]

There was a section in the Draft Bill, which was based on the opinion apparently held by the late Lord Romilly in *Dixon* v. *Gayfere* on the subject of successive and independent trespassers. The section ran thus :—

"30. Where a series of trespassers, adverse to one another and to the rightful owner of any immoveable property or hereditary office, take and keep possession thereof for several periods, each less than the period so limited, but collectively exceeding such period, the person who is in possession of such property or office when the title of the rightful owner would have been extinguished, had the trespassers not been adverse to one another, shall have a right to such possession."

This section, however, was struck out, because the Select Committee were not sure that the proposed

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and that by its own force it not only extinguishes the right of the former rightful owner, but transfers the legal fee-simple to the party in possession. It is apprehended, however, that it may more strictly be said that its operation in giving a title is *negative;* it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to eject him." Darby and Bosanquet, 389. See Scott *v.* Nixon, 3 Dru. and War., 407; and Dixon *v.* Gayfere, 17 Beav., 421. Possession is *continuous* when it is held either by the *same* person (without intermission) or by several persons *claiming one from the other*.

[5] This difficulty cannot arise in cases falling under art. 144 of Act XV of 1877. See p. 170, *supra*.

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rule was right, and because they believed that such a rule would be of little or no practical utility.[6]

In the case of successive and independent trespassers.

Where the rightful owner has been out of possession for more than the prescribed period, and none of the independent trespassers has been in possession for the full period, the right may *possibly* vest in that one of the trespassers who has held the property for the *longest* period, or in the *first* or the *last* of the trespassers. Lord Romilly was of opinion that, as the last occupier can maintain his possession against all, including the true owner, whose right is *ex-hypothesi* extinguished, the *right* vests in such occupier.[7]

But it may be observed that if A, the party in possession at the time when the title of the rightful owner is extinguished, is himself dispossessed by another trespasser who holds the property for a much longer period than A, it would be hardly fair to declare the title in favor of A, simply because he happened to be in possession at the *end* of the period of limitation for the rightful owner's suit for possession.

In *Asher* v. *Whitlock*,[8] Cockburn, C. J., expressed an opinion in favor of the *first* trespasser. Messrs. Darby and Bosanquet would draw a distinction between cases where the first trespasser has been in possession for a very short time, and where he has been in possession for a very considerable time.

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[6] See Mr. Stokes' speech in the Legislative Council, 19th July 1877. The learned editors of Smith's Leading Cases make a suggestion similar to that made by the framers of the Draft Bill.

[7] Dixon *v.* Gayfere, 17 Beav., 421.

[8] L. R., 1 Q. B., 1. Priority of possession, it was held, was sufficient proof of title against a subsequent trespasser *whose* possession did not extend over the full period of limitation.

They ask whether the presumption of title of a succeeding trespasser ought not to prevail against a prior possessor, if the former has been in possession for a much longer period than the latter.[9] Mr. Banning, in his work on the Limitation of Actions,[10] says that whatever difficulties may exist in the theory countenanced by Lord Romilly, equal or greater difficulties will be found in any theory which gives back the title to the *first* of the trespassers at the expiration of the statutory period.

In British India, there is, at present, a conflict of opinion as to the sufficiency of mere prior possession (not extending over twelve years) in proving a title.[1]

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[9] Darby and Bosanquet, p. 392. Where it is proved that *A* was in possession for eleven years and *B* for nine years as successive trespassers, *B's* suit for ejectment against an assignee of the true owner who succeeded by some means in getting into possession, may be dismissed on the ground that there is *primâ facie* evidence of the title being in *A*, of which the defendant is entitled to take advantage. See Doe *v.* Barnard, 13 Q. B., 948, 953.

[10] Banning, p. 106. In Goodtitle *v.* Baldwin, 11 East., 488, a prior possessor sued a person who had been in possession for several years immediately before the suit, and it was held that the plaintiff must recover by the strength of his own title, and not by the weakness of that of the defendant.

[1] See Joytara *v.* Mahomed, 11 C. L. R., 399, 406.

Possession, if unexplained, is evidence of rightful ownership at the time (notwithstanding sec. 15, Act XIV of 1859). See 9 W. R., 602. Where the evidence does not disclose a better title in any person, the prior possession of the plaintiff is itself a title against a person who has wrongfully dispossessed him. Justice D. N. Mitter held that this rule is not affected by the provisions of sec. 15, Act XIV of 1859. Khajah Enaitoolah *v.* Kishen Soonder, 8 W. R., 386. Sir Richard Garth, C. J., also is of the same opinion. See Mohabeer *v.* Mohabir, 9 C. L. R., 164. Justices Prinsep, Tottenham, and O'Kinealy are of a different opinion—see Debi *v.* Issur, I. L. R., 9 Calc., 39; Erteza *v.* Barry, 11 C. L. R., 393. See also Jhoomuck *v.* Burral, 21 W. R., 52, and pp. 168 and 172 (note), *supra*. Sargent, C. J., and Kemball, J., have recently held, that the remarks of the Privy Council in Wise *v.* Ameerunissa, on this subject, must be read in conjunction with their finding that the evidence disclosed a better title in the defendants. Krishnarav *v.* Vasudev, I. L. R., 8 Bomb., 371, 376.

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Here, therefore, there are still greater difficulties in the theory propounded by Cockburn, C. J.

Continuous possession transfers the right and confers a good title.

But where there is *continuous* possession for the requisite period by or through the original disseizor, the law practically confers a good title on the possessor. The principle adopted in Bengal, even before Act IX of 1871 came into operation, was that the period of possession which was sufficient to bar the remedy was also sufficient to *transfer* the right. Sir L. Peel and Sir J. Colvile in 1 Boulnois' Reports, 70, Mr. Justice Markby in 17 W. R., 119, Sir Richard Couch in 20 W. R., 120, and Sir Richard Garth in 25 W. R., 282, and I. L. R., 3 Calc., 224, acted upon this principle.

Even in a suit for *declaration of title* and confirmation of proprietary right, the plaintiff is entitled to a decree, if he has been in possession of the land for the prescribed period, and the nature of the case and the state of the pleadings admit of the plaintiff's asking for a declaration of title by possession.[2] Possession for the prescribed period being a good title by itself, the Court cannot refuse to recognize that any more than it can refuse to recognize a conveyance from a previous owner.[3] But no decree can be given in favor of the plaintiff upon a ground which is not

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[2] Ram Lochun *v.* Ram Soonder, 20 W. R., 104. But where a tenant asks for a declaration of his title to a tenure, and failing to prove the particular title set up in the plaint, only shows nineteen years' possession, the Court is not justified in declaring that the plaintiff holds the *particular* tenure alleged by him; see 14 W. R., 109 (foot-note); 20 W. R., 104, 105. I. L. R., 3 Calc., 225, 227; and I. L. R., 4 Calc., 699, 703.

Tirumalasami *v.* Ramasami, 6 Mad., 420, is in direct conflict with Sir Richard Couch's decision in 20 W. R., 104.

[3] Shiro Kumari *v.* Govind Shaw, I. L. R., 2 Calc., 418, 421.

suggested in the plaint or in the issues tried.[4] The question of a possessory title should be properly raised in the plaint or in the issues, so that the defendant may have notice that such a point was going to be raised.[5]

Person in whose favor limitation is running has a transmissible interest.

It has been further held, that the title of the wrong-doer can be transferred to a third person whilst it is in *course* of acquisition and before it has been perfected by a possession for the full prescribed period.[6] The person in possession may waive whatever estate he may have acquired *before* the period of limitation has expired.[7] Where the full period has run out, and the right of the owner has been extinguished, a mere acknowledgment of the right by the adverse holder does not revive the right so extinguished.[8]

Sec. 28 gives a good title against the party whose suit is barred.

Section 28 of Act XV extinguishes the right and title of the person out of possession, and as *against him* gives to the title of the person in possession legal force and validity. A Court of Equity

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[4] Bhaygo *v.* Mahomed, 25 W. R., 315. As to specific *mokrurri* or *leasehold* titles, in a suit against the *landlord* or his representative, see Bijoya *v.* Bydonath, 24 W. R., 444, and Brindabun *v.* Dhananjoy, 4 C. L. R., 443.

[5] Shiro Kumari *v.* Govind Shaw, I. L. R., 2 Calc., 418. The question should be raised with sufficient clearness in the Court of first instance to enable the defendant to understand that the plaintiff claimed to succeed as well by twelve years' adverse possession as by the specific title alleged. Krishna Churn *v.* Protab Chunder, I. L. R., 7 Calc., 560. Where the possession is referable to the alleged specific title, and to that *alone*, and the specific title is disproved, the possession avails nothing. 5 W. R., P. C., 69.

[6] Brindabun *v.* Tarachand, 20 W. R., 114; Gosain Dass *v.* Issur Chunder, I. L. R., 3 Calc., 224.

[7] Brown, 580; Doe *v.* Groves.

See p. 170, *supra*.

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would force upon a purchaser a title so acquired, and a purchaser may take that title with safety.[9]

Title gained commensurate with interest extinguished.

The title gained by possession being limited by right yet remaining unextinguished, is *commensurate* with the interest which the rightful owners have lost by the operation of the Act, and must have the same legal character.[10] If the person whose suit for possession has been barred by the Act had a leasehold interest only, the party in possession cannot have a higher interest.[1] Similarly, adverse possession against either a mortgagor *or* mortgagee does not necessarily give the possessor an absolute right against *both*.[2]

Title gained is sometimes gained on behalf of the landlord of the possessor.

When a person takes wrongful possession of land and keeps it for the prescribed period, claiming to be *absolutely* entitled to it, or *not* claiming a *limited* interest therein, he gains, for his *own* benefit, the whole estate in perpetuity as against persons whose suits for possession are barred by limitation.[3] But if a lessee, during the continuance of his lease, takes possession of contiguous lands belonging to a third person, and holds it *as part of the demised premises* for the prescribed period, he acquires the lands for the benefit of his *landlord*.[4]

The doctrine of estoppel may affect the transfer of the right.

A tenant-for-life affected to devise the estate to *B* for life, with remainder to *C*. The reversionary heir did not interfere, and *B* took and held possession for

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[9] Brown, 731; Scott *v.* Nixon, 3 Dru. and War., 388; Gunga Govind *v.* The Collector, 7 W. R., P. C., 21.

[10] Darby and Bosanquet, p. 390.

[1] See p. 154, *supra*. [2] See pp. 162—164, *supra*.

[3] See Darby and Bosanquet, p. 394; see also pp. 139 (note 6), and 146, *supra*.

[4] Darby and Bosanquet, p. 395. See pp. 149, 150, *supra*, and I. L. R., 10 Calc., 820.

more than twenty years. *B* then conveyed the premises absolutely to the defendant, and died shortly after the transfer. The assignee of *C*, the remainderman, brought ejectment. It was held (in England), that *B*, who claimed only a *limited interest under the will*, did not acquire a title as against the remainderman under the same will, although the will itself was inoperative. *B* entering under the will was *estopped* from disputing the validity of the will, and setting up a possessory title as against the remainderman.[5]

Accessory rights extinguished with the principal.

When the principal right is extinguished by limitation, the extinction of an accessory right follows as a matter of course. When the right to an hereditary office is extinguished by limitation, the right to the profits of the office, whether accruing within the period of limitation or not, is also gone, in the same way as when the principal debt is barred by limitation, a suit for the interest on the debt is also barred.[6] Section 48 of Act V of 1882 expressly enacts that when an easement is extinguished by non-user or otherwise, the rights (if any) accessory to such easement are also extinguished.

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[5] Darby and Bosanquet, 394; Banning, 107; Board *v.* Board, 9 L. R., Q. B., 48. It seems that, if the will does not *purport* to pass the *specific* land in question, a possessory title may be gained against the remainderman. Paine *v.* Jones, 18 Eq., 320, cited in Banning on Limitation, p. 110.

[6] See Tammirazu *v.* Pontina, 6 Mad., 301; Valia *v.* Viraraya, I. L. R., 1 Mad., 228. Where the principal right created by a grant is extinguished by the *cancellation* of the grant, the accessory right to monies *already* due may survive the extinction. Morbhat *v.* Gungadhur, I. L. R., 8 Bomb., 234, 236. Cf. Chhaganlal *v.* Bapubhai, I. L. R., 5 Bomb., 68.

# LECTURE XII.

## EASEMENTS.[7]

Different significations of the term 'easement' — 1st sense — 2nd sense — 3rd sense — 4th sense — 5th sense — Easements should be distinguished from rights of property, natural rights, rights in gross, customs, licenses, and other incorporeal rights — Distinguished from rights of property — The nature of julkur rights — Party-walls — Easements distinguished from natural rights — Nuisances and disturbances of easements — Easements distinguished from licenses — Easements distinguished from customs — Easements distinguished from rights *in gross* — Public ways — Easements distinguished from other incorporeal rights — Monopolies, patent-rights, copy-rights, ferries, &c. (Highways, thoroughfares, and towing-paths) — Certain incorporeal rights how acquired — Trees encroaching on a neighbour's land — All restrictions are not servitudes or easements — No easement consists *in faciendo* — *Nullá res sua servit* (*Hauts* and markets — Liability to repair walls and embankments) — Servient owner cannot require easement to be continued — No reciprocal easements — Artificial watercourses — Cross-easements — How far the causes of easements must be permanent — Indivisibility of easements — Easements affirmative or negative — There is no *purely* affirmative or negative easement — Easements continuous or discontinuous — Apparent or non-apparent — Urban or rustic — Inconsistent and subordinate easements — Every system of law recognizes servitudes — Mahomedan law — Hindu law — Servitudes recognized by the Civil law — Easements recognized by the English law — Profits a prendre recognized by English law — May easements not now known to the law be created? Right to prospect, privacy, &c. — Indian statutory law before 1882 almost wholly silent on the subject of easements — Points of difference between the English and the Indian law — The Indian Easements Act, 1882 — Easements have a *special* origin — Modes of origination: I. Express grant — II. Implied grant or reservation —

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[7] Besides the provisions relating to the extinction of the right to *property* treated of in the last Lecture, the law of prescription in British India includes some rules relating to the acquisition and extinction of the right to *easements* by prescription. This portion of the law of *prescription* is the *main* subject of the present Lecture. See pp. 11, 12, and 13, *supra*.

Easements of necessity — *Quasi*-easements. Disposition of owner of two tenements — *Quasi*-easements when *impliedly* granted or reserved — Instances of easements of necessity — Instances of *quasi*-easements — Where *express* words are necessary — Effect of the words "appurtenances" and "easements enjoyed therewith" — III. Local custom — IV. Estoppel — V & VI. Prescription, and presumption of lawful origin — Prescription at Common Law — The fiction of a lost modern grant — Statutory prescription in England — Difference between a twenty and a forty years' user — The English prototype of the Indian Law of Prescription — Four ways of claiming easements by long enjoyment in England — The second recognized in British India — Statutory prescription in British India — The law is remedial, and neither prohibitory nor exhaustive — Presumption of a lawful origin — Duration of enjoyment required — Quality of enjoyment required — Enjoyment need not continue till within two years of suit — Otherwise under the statutory rule — 25 or 30 years' enjoyment, whether ending within two years of suit or not, will raise the *presumption* — The present statutory rule of prescription — A fluctuating body of persons cannot claim under the rule — Enjoyment must be peaceable — Enjoyment must be open, except in the case of light, air, and support — Enjoyment *as an easement* necessary — Unity of title and unity of possession — Enjoyment must be *as of right* — Enjoyment *by* whom? — What constitutes enjoyment — Proof of continuous enjoyment *for* the prescribed period — What is or is not an interruption — Effect of repeated adverse obstructions and voluntary discontinuances — Effect of interruptions in enjoyment as *an easement* and *as of right* — Computation of the prescriptive period — Conditional exclusion in favor of reversioner of servient heritage — Effect of the exclusion — The rule of prescription how far binding on Government — Prescription in British India does *not* imply a grant — The rule applies to negative as well as to affirmative easements — Interruption of enjoyment of easement need not be conveniently practicable — But enjoyment must be *capable* of interruption — What easements cannot be acquired by prescription: 1. Right destructive of servient heritage or of subject — 2. Right to free passage of light or air to open space — 3. Right to surface-water not flowing in a stream, and not permanently collected. 4. Right to underground water not passing in defined channel — Rights acquired by prescription are absolute and permanent — Prescription legalizes previous user — Extent and mode of enjoyment of prescriptive rights — How far mode and place of enjoyment may be altered — Extent of prescriptive right to receive light or air, or to pollute air or water — Implied acquisition of accessory or secondary easements — Extinction of prescriptive right: 1. When released. 2. When it becomes useless. 3. When there is increase of burden by permanent change in dominant heritage. 4. When there is permanent alteration of servient heritage by *superior force*. 5. When either heritage is completely destroyed. 6. When there is unity of title. 7. When the right has not been enjoyed for twenty years (Light prevented falling at an angle of 45 degrees) — Rules of extinctive prescription under Act V of 1882 — Analogous rules under the English and the old Indian law.

LECTURE XII.

Different significations of the term 'easement.'

THE term *easement* has scarcely any settled import.[8] It is sometimes used as almost synonymous with *servitudes*, which are certain rights *in rem*, *in re alieno solo*,—certain rights, availing against the world at large, over the land of another. These rights are rights of *definite and restricted user*. They are *definite* fractions subtracted from the owner's rights of *user and exclusion*.[9] An *easement*, in this sense, is a right over land other than ownership. Such a right may be either (1) real, prædial or appurtenant, or (2) personal or *in gross*.

1st sense.

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[8] See Austin, Lectures, 49.

[9] See Austin, Lectures, 51 and 52. The full rights and powers of using, of taking the produce or fruits of, and of disposing of, the subject of *dominium*, are designated *jus utendi*, *jus fruendi*, and *jus abutendi*, or shortly, *usus*, *fructus*, and *abusus*. Dominium or ownership consists of these rights and powers. Servitudes are fragmentary rights separated from the full rights of ownership. These fragmentary rights affect the owner's right of using the property and taking its produce. They are termed *servitudes*, because the property is under a kind of slavery or service, for the benefit of the person entitled to exercise such fragmentary rights. The serving property is called the servient tenement or heritage. If a servitude is appurtenant to any property, the property to which it is appurtenant is called the dominant tenement or heritage. The owner or occupier of the dominant heritage is called the "dominant owner." The owner or occupier of the servient heritage is called the "servient owner." Lands, houses, and other things permanently attached to the earth are tenements or heritages. *Land* includes land covered by water. (6 C. L. R., 269.) It also includes things permanently attached to the earth. (Sec. 4, Act V of 1882.)

The *nudus usus*, *usufructus*, *habitatio*, *superficies*, and *emphyteusis* of the Roman lawyers are not servitudes *properly* so called. In the language of the English law, they would be styled rights of *property*. Several other rights *in re alieno solo*, such as the rights of mortgagees in the property mortgaged, are also not servitudes proper, but rights of property modified by regard to the rights of the mortgagors.

The term servitude is used to express both the right and the corresponding duty. The term easement generally expresses the right only. (Gale, p. 2.) The servitude relating to tithes in England is never styled an 'easement.'

In a second and less extended sense, the term 'easement' is *restricted* to real or prædial servitudes,—*i.e.*, such as are appurtenant to some land or *prædium* of the person claiming them. In this sense, personal servitudes or servitudes *in gross* are *not* 'easements.' According to Lord St. Leonards, a dominant tenement is not necessary to the existence of an 'easement,' but later authorities (including Lord Cairns) are very distinctly of opinion that there can be no easement *properly* so called unless there be *both* a servient and a dominant tenement.[10]

2nd sense.

In a third and still more restricted sense, 'easements' mean such real servitudes as are acquired merely for the *ease* or *convenience* of the dominant owner, and not for any participation in the *profits* of the servient heritage, that is, such rights as do not entitle the dominant owner to take, out of the servient tenement, any corporeal thing except water. Messrs. Gale and Goddard[1] adopt this third sense of the term,

3rd sense.

[10] See Gale on Easements, 5th Ed., pp. 13 and 14.

[1] Gale's definition is as follows: "An easement is a privilege, without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged *to suffer or not to do* something on his own land for the advantage of the dominant owner."

Goddard's definition runs thus: "An easement is a privilege, without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former."

The definition given in Tudor's Leading Cases on Real Property is as follows: "An easement is a privilege, without profit, which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient tenement, to compel the owner thereof to permit to be done or to refrain from doing something on such tenement for the advantage of the former."

These definitions are so far defective that they include natural, as well as conventional, easements. See Goddard, 2nd Edn., pp. 2 and 3.

LECTURE XII. and restrict it to servitudes appurtenant, *exclusive* of (what in English law are called) profits *a prendre*.[2]

Easements, according to the definitions given by Messrs. Gale and Goddard, are of two kinds :— I. Natural Easements, better known as Natural Rights; and II. Artificial or Conventional Easements. But the term Easement is *commonly* used exclusively to denote the second class of easements. In Justice Innes' Digest of the Law of Easements, the term is defined in this its ordinary sense.[3]

4th sense. According to sec. 4 of the Indian Easements Act,[4] easements are *real* servitudes *including* profits *a prendre*. The context of the Act shows that the term is used to denote *conventional* servitudes only.

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[2] See p. 384, note, *infra*.

[3] In this Digest, Rights of vicinage, *acquired* for the use of a tenement, are called servitudes ; and servitudes, without a right to make a profit out of the substance of the neighbouring tenement, are called easements. Gale modifies his definition by saying that all easements originate in express, implied or presumed grants or agreements. Goddard also distinguishes easements created by the act of man from 'Natural Rights,' and throughout his work, *uses* the term in its ordinary restricted sense.

[4] The Indian Easements Act (V of 1882), sec. 4, enacts as follows : "An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own." This definition also includes what are called 'natural rights or 'natural easements,' but sec. 7 of the Act shews that 'natural rights, not being restrictions of *other* legal rights, are not 'easements' within the meaning of the Act.

It will be observed that Messrs. Gale and Goddard call an easement a *privilege*, and in their definitions, refer to the negative *duty* of the *servient* owner not to do something on his own land. Section 4, Act V of 1882, on the other hand, calls an easement a *right*, and refers to the *dominant* owner's *power* of doing something or preventing something being done on another's land. Messrs. Gale and Goddard define an easement from the servient owner's point of view. The Indian Legislature defines it from the dominant owner's point of view.

Act (XV of 1877) lays down that in that Act 'easement' includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own *profit* any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon the land of another. And as profits *a prendre* may unquestionably be either real or personal according to English law, it has been held that profits *a prendre in gross*, not being expressly excluded by this definition, are 'easements' within the meaning of Act XV of 1877.[5]

5th sense.

The following table shews the several meanings of the term, and their relations to each other:

- SERVITUDES, OR EASEMENTS IN THE FIRST SENSE.
  - A. Real, prædial, or appurtenant. (Easements in the 2nd sense).
    - 1.—Natural, *e.g.* — Right to support for land from land. Right to due enjoyment of air, light, and water naturally flowing over one heritage to another.
    - 2.—Artificial, conventional, or acquired. (Easements in the 4th sense—Act V of 1882.)
      - 1.—Easements (in the 3rd sense.—Gale, Goddard, Act IX of 1871).
      - 2.—Profits *a prendre*.
  - B. Personal or *in gross*.
    - 1.—Easements improperly so called.
    - 2.—Profits *a prendre*.

  Easements in the 5th sense.—(Act XV of 1877.)

  *N.B.*—It is doubtful if easements, in this sense, include easements *improperly* so called.

In this Lecture I shall, in general, use the term 'easement' in the sense in which it is used in the Indian Easements Act, that is, as exclusive of servitudes in gross and 'natural rights,' and as inclusive of profits *a prendre* appurtenant. An easement, then, is a right (other than a natural right) which the owner or occupier of certain land possesses, as such owner or occupier, for the beneficial enjoyment of

[5] Chundee *v.* Shib, I. L. R., 5 Calc., 915; 6 C. L. R., 269. See p. 391, note 10, *infra*.

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that land, to do and continue to do something (including the taking of profits), or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. In affirmative easements, the dominant owner has the right to *do* and continue to do something. In what are called negative easements, he has the right to *prevent* and continue to prevent something being done. The servient owner is bound to *permit* the doing of that thing, or to *refrain* from doing that other thing. The dominant owner is entitled to enjoy the right without disturbance by *any other person.*

Easements should be distinguished from certain other rights.

In order to understand the nature of easements, it is necessary to distinguish them from rights of property, natural rights over neighbouring lands,[6] local customary rights *in re alieno solo*, licenses in respect of immoveable property, servitudes *in gross*, and other incorporeal rights.

Distinguished from rights of property.

In one sense every easement may be regarded as a *right of property* in the owner of the dominant tenement, not a full or absolute right, but a limited right or interest, in land which belongs to another whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement.[7]

An easement, as well as a right of property, is a right *in rem.*[8] A right arising out of a contract, being a

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[6] For instances of natural rights, not being rights over *land*, see p. 8 (note), *supra.*

[7] *Per* Lord Watson in Dalton *v.* Angus, 6 App. Cas., 740, 830.

[8] The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by *any other person.* Section 32, Act V, 1882. In the case of a negative easement, it is *less likely* that a *stranger* (*i. e.*, a person other than the servient owner) should disturb.

right *in personam*, cannot be either a right of property or an easement. But a right *of property*, strictly so called, generally gives the party entitled an *indefinite* power of applying the land to *all* uses or purposes, save such as are inconsistent with his relative or absolute duties; while an *easement* is a right to *put* the land to uses of a *definite* class, or to *prevent* its being put to uses of a *definite* class.[9]

The owner's right of walking over his own land, of building upon it, of digging under it, of excluding others from his land, or of preventing them from interfering with the legal use of his land are *ordinary rights of property*. These ordinary rights of property which are determined by the boundaries of the land are not 'easements' in any sense of the word.

An easement is a right *in re alieno solo*, in the land or tenement of *another*, or in land or tenement which is not the claimant's own.[10] When the owner

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[9] Austin's Lectures. pp. 823, 836. Such relative duties as arise from *contracts* with the owners of neighbouring lands, and correspond to rights *in personam*, are not easements. Absolute duties annexed to property (such as that of preventing a house in a town from getting into a ruinous state) are also not easements. Restrictions imposed on the owner's rights of user by such general maxims as *sic utere tuo ut alienum non lædas* (use your property so as not to injure others) are similarly not 'easements.' These general restrictions apply to *all* heritages.

[10] The rights and liabilities of the owners of property adjoining to a party-wall, when such wall is their *common property*, partake of the character of easements, but are *not easements*. When such wall belongs to *one* of the adjoining owners, it may be subject to an easement in the other, to have it maintained as a dividing wall between the two tenements. See Gale, p. 513; Watson *v.* Gray, 14 Ch. Div., 192. In this Chancery case, Fry, J., gives the four different senses of the term Party-wall:—(1) where the wall is common property; (2) where one strip of it belongs to one of the neighbours and the other to the other; (3) where the wall belongs to one of the neighbours, subject to an easement in the other to have it maintained; (4) when the wall is divided into two strips (longi-

Party-walls.

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of estate *A*, acquires a right of way over the adjoining estate *B*, he acquires an easement, but does not acquire a right of property in the servient estate *B*, though his right of walking over *B* is similar in many respects to the right of the owner of *B quâ* owner to walk over his own estate. The owner of *A* can use *B*, *only* for the purposes for which he acquires the easement, while the owner of *B* can use it for *all* purposes save such as are inconsistent with his general or particular duties.

But *all* rights *in rem* over *another's* property are not easements. The rights of the lessee or the usufructuary mortgagee over the demised or mortgaged land are not easements. They are *rights of property* in the land, modified by regard to the rights of the lessor or the mortgagor. Besides, such rights not being ancillary to the enjoyment of other lands of the lessee or mortgagee, are not *rights appurtenant*, as easements (proper) always are.

The nature of julkur rights.

The *julkur* right of fishery in small and shallow rivers, the beds of which are recognized as the property of the claimant himself, is unquestionably a *right of property*.[1] Julkur rights in navigable rivers also are often settled as separate estates, and sold for arrears of revenue, and such rights have often been granted by Government extending over large estates,

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tudinally) and each strip is subject to a cross-easement in favor of the owner of the other strip. Akilandammal *v.* S. Venkatachala, 6 Mad., 112, gives an instance of the first sense of the term. See Radha Mohun *v.* Raj Chunder, 2 C. L. R., 377, 381, for an instance of the second sense of the term, but Justice Markby does not call the wall in that case a party-wall.

[1] See Beng. Reg. XI of 1825, sec. 4, cl. 4. Such a right of fishery is called "a territorial fishery." I. L. R., 2 Bomb., 19, 46.

the property of persons other than the grantees of the *julkur*.[2] Under Act IX of 1871, such rights, though incorporeal, were treated as interests in immoveable property, or proprietary rights.[3] As these rights are not appurtenant to other heritages or estates, they are *not easements* under the Indian Easements Act. And when these julkur rights entitle their holder to *all* the profits derivable from a river, lake, or other water in a tract of country, subject to *no restriction* in favor of the owner of the bed or subsoil, they are hardly servitudes in the ordinary sense of the term.[4] The fact that *julkurs* are often described as *mehals* or estates, goes, to a certain extent, to shew that they are generally treated as rights of *property*.

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[2] See Gour Huri *v.* Amirunnissa, 11 C. L. R., 9; Radha Mohun *v.* Neel Madhub, 24 W. R., 200; Moharanee Surno Moyee *v.* Digumbery Debea, 2 Shome's Rep., 93.

It has been held by the Privy Council, that in British India the Government has a freehold in the bed of navigable rivers, and in the land between high and low watermark. *Doe dem* Seebkristo *v.* E. I. Company, 6 Moo. I. A., 267. It has been held by the Calcutta High Court, that the Government has also the right of excluding the public from fishing in such rivers. The Government has, in many instances, granted to private individuals the exclusive right of fishery in such rivers. See Chunder *v.* Ram, 15 W. R., 212; see also 11 C. L. R., 9.

[3] Parbutty *v.* Mudho, I. L. R., 3 Calc., 276. In 2 Shome's Report, 93, julkur rights are treated as rights of property even as against the owners of the estates over which the rights extend. But the grantee does not derive his rights from the owners of such estates, and such rights are not treated as fragments of *their* rights of ownership.

As to the rights of the sovereign or the Government and of the public in navigable rivers and the sea, see Baban *v.* Nagu, I. L. R., 2 Bomb., 19.

A *several fishery*,—*i.e.*, a fishery in waters covering land which does not belong to the claimant, like all *exclusive* profits *a prendre*, but unlike most other easements, is, in English law, capable of being *trespassed* upon. See I. L. R., 2 Bomb., 45.

[4] There are authorities for the proposition that an indefinite claim to destroy the subject-matter cannot be supported as a profit *a prendre in alieno solo*. See 7 App. Cas., p. 646.

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Besides, as these rights are transferable and capable of being let out to tenants, *independently* of *other* property, they are not easements within the meaning of the Transfer of Property Act.[5] Where the owner of the bed of a river or lake grants to another *definite* rights over his water, or such rights are acquired by prescription against the owner, such rights are servitudes and not rights of property.

The grant of a several (*i.e.* exclusive) fishery for only one *particular* species of fish, can give the grantee no property in the water or in the subsoil. In England, the grant of an exclusive fishery, without any restriction as to the kinds of fish to be taken, specially where the grantor reserves a rent, *primâ facie* includes the soil.[6] Where the grant of a *julkur expressly* conveys (besides exclusive rights of fishing) *other* purely aqueous rights (such as the gathering of rushes and other vegetation which arise from and are connected with water), it may be very well conceived that, if in such cases the right to the *soil* were implied in the grant, it would be wholly unnecessary to *specify* these particular rights; if the grantee

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[5] See sec. 6, Act IV of 1882. It is apprehended that even under Act XV of 1877 such *indefinite* aqueous rights are rights of *property*, and not profits or easements. It has, however, been held, that the interest of a lessee of a julkur or sayer mehal is not an interest in land within the meaning of the District Road Cess Act (Beng. Act X of 1871). See David *v.* Grish, I. L. R., 9 Calc., 183.

According to English law, the owner of a profit *in alieno solo* (whether in gross or appendant to land) may get the benefit of his profit by selling or letting an interest in it, for a longer or shorter term, and during the term the transferree has an irrevocable *license* to take so much of the profit. See 7 App. Cas., 658. Cf. 11 C. L. R., 9.

[6] Brown, 179, 190. Marshall *v.* The Ulleswater Steam Navigation Company, 3 Best & Smith's Reps., p. 732.

were the owner of the land, he would, as a matter of course, be entitled to everything on it. However, although a *julkur* does not *necessarily* imply any right in the subsoil, the fact that a *julkur mehal* is sometimes called a *mouza* shews that the settlement of a *julkur may* include the soil.[7]

Easements distinguished from natural rights.

Besides the *ordinary* rights of property which are determined by the boundaries of the land, there are certain *accessorial* rights, *incident* to the ownership of land, which entitle the owner to enjoy the natural advantages arising from the situation or position of the land in relation to *other* lands in its vicinity. The right of every owner of land that such land in its natural condition shall have the support (vertical and lateral) naturally rendered by the subjacent minerals and adjacent soil of another person, the right of the owner of higher land that the fall of its surplus rain-water upon the adjacent lower ground shall not be obstructed by the owner of the latter, the right of every riparian owner to the uninterrupted flow (subject to lawful use by others) of a natural stream[8] in

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[7] Radhamohun *v.* Neel Madhub, 24 W. R., 200; David *v.* Grish, I. L. R., 9 Calc., 183; Rakhal *v.* Weston, I. L. R., 10 Calc., 150.

[8] See Illustration (*h*), sec. 7, Act V of 1882. As to the natural right to use the water of a natural stream or lake, by riparian proprietors, for their household purposes, for watering their cattle, and to some extent for irrigating their land, or for the purposes of any manufactory situate thereon, see Illus. (*j*) of the same section; see also Rameshwer *v.* Koonj, I. L. R., 4 Calc., 633, 637, P. C.

It may be here observed, that the right of a riparian proprietor to the use of a stream does not depend on the ownership of the soil of the stream; hence a riparian owner on a navigable and tidal river, in addition to the right connected with navigation, to which he is entitled as one of the public, retains his rights as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation. Tudor, p. 195; Lyon *v.* Fishmonger's Company, 1 App. Cas., 162.

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The right of every owner of land to so much light and air as pass *vertically* thereto is an ordinary right of property, based upon the maxim *cujus est solum, ejus est usque ad cœlum et inferos.*[10] The right to light and air in its natural state transmitted *laterally* over and from a neighbouring estate, differs from the right to natural streams of water. The first and paramount right which the ownership of land seems to give, is that of doing what the owner pleases thereon, either by building or otherwise; and therefore he has by such primary right the power of obstructing the lateral passage of

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As to the difference between the ordinary use of the water of a flowing stream (for original purposes), and the extraordinary use of the water (for manufacturing or irrigation purposes), see Miner *v.* Gilmour, 12 Moore, P. C., 131, 156; and Ormerod *v.* Todmordon Mill Co., 11 Q. B. D., 155, 168, 172; Sardowan *v.* Hurbans, 11 W. R., 254.

Any user of water by a *non-riparian* proprietor, even under a license or a grant of an easement from a riparian owner, is wrongful if it sensibly affects the flow of the water by the lands of other riparian owners. Ormerod *v.* Todmordon Mill Co., 11 Q. B. D., 155.

As to the natural right of discharging rainfall by natural means through a natural watercourse passing through another's land, see Khetter *v.* Prossunno, 7 W. R., 498. As to the flow of surface drainage water from higher lands, see W. R., Special Number, F. B., 25. See also Kopil *v.* Manick, 20 W. R., 287, as to water naturally falling on one's land running off over adjoining land of a lower level. I. L. R., 1 Mad., 335.

[9] See the judgment of Lord Selborne in Dalton *v.* Angus, 6 App. Cas., 740; Goddard, p. 3, note (c). Easements proper are also *accessorial* rights trenching upon the liberty of others, but they are *not* incident to the ownership of land.

[10] "Whose is the soil, his it is even to heaven and to the middle of the earth."— *Wharton.*

light and air from over his own land to adjacent lands.[1] But the owner of such lands may *acquire* (as an easement proper) the right to prevent such obstruction, by grant or prescription. The right to light and air transmitted *laterally* is, therefore, not a *natural right*, unless recognized as such by special customs. Support to that which is *artificially* imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be *acquired*, in order to make it a burden upon the neighbour's land, which (naturally) would be free from it. But the right to support of *buildings*, when *acquired*, is the same in character as the natural right to support of *land*.[2]

An easement, in the words of Mr. Gibbons, is rather a fringe to property than property istelf. So far as the *dominant* owner is concerned, it is something superadded to the ordinary and natural rights of property. It is a privilege *exceeding* what would of common right belong to the owners of lands and tenements as such. It is some advantage derived by one tenement from or upon a neighbouring tenement, *greater* than what would naturally and ordinarily belong to the former. 'Natural Rights' (that is, the accessorial rights which are sometimes called 'natural easements'), like the ordinary rights of property, are secured to the landowner by the common law of the country.[3] They are inherent in the land *ex jure*

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[1] Broom and Hadley, Vol. II, p. 40; Goddard, p. 32.

[2] See 6 App. Cas., p. 792.

[3] See Goddard, p. 2. In the report of the Law Commission on the codefying bills, 1879-80, the ordinary rights of property as well as the accessorial natural rights are called 'natural rights.' In the Statement of

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*naturæ*, of *natural* right. They owe their origin to the disposition and arrangements of Nature, are more purely negative[4] in their character, and though susceptible of being suspended by adverse easements, are incapable of being extinguished permanently, inasmuch as they *revive* on the extinction of such easements.[5]

As regards the *servient* heritage, Easements are *restrictions* of the 'ordinary rights' of property, or of the accessorial rights called 'natural rights.'[6]

Easements are not given to *every* owner of land, but are created by *special* human acts or incidents. They may be either positive rights to do something on another's land, or negative rights to prevent something being done on his land. Natural rights need no age to ripen them, nor any particular incident to create them. A 'natural right' is an incident of property, not acquired by long and continuous

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Objects and Reasons appended to the Easements Bill, both these classes of rights are described as "rights incidental to the ownership of immoveable property."

[4] But the natural right to support of land, and the right to discharge surplus rain-water, *partake* of the character of *positive* easements.

It may be further observed that there can be no "natural rights" *in gross* over another's land, and that there are no *natural* profits *a prendre*, in respect of *another's* land. The right of the public to fish in the sea is, however, sometimes treated as a *natural* profit *in gross*. But such a right is neither a servitude nor a right of *property*. See I. L. R., 2 Bomb., pp. 51, 52, and 53. There are also no *natural* rights of way. (Goddard, p. 68.)

[5] See Gale, pp. 2 & 3; Goddard, p. 356. *A's* natural right to build on his own land may be suspended by *B's* easement to the access of light. but it will not be extinguished thereby. A natural right (as well as an easement) may, however, be *abandoned* by the dominant owner. (Khetter Nath *v.* Prossunno, 7 W. R., 498.)

[6] See sec. 7, Act V of 1882, which gives ten instances of these two classes of rights.

user, and in no way dependent on the consent, express or implied, of the owner of the servient heritage. It is in the words of Justice Innes, "a right of vicinage attaching to the situation of the tenement." Easements proper are *conventional*, and must be *acquired* by grant, prescription or other means.

Nuisances and disturbances of easements.

Annoyances caused by infringements of natural rights are called (private) *nuisances*. Those caused by infringements of easements are called *disturbances*. Repeated acts amounting to *nuisances* may in course of time confer prescriptive easements inconsistent with natural rights.[7]

Easements distinguished from licenses.

A lease of *B's* land to *C*, gives *C* an interest, or a (limited) right of property in *B's* land. An easement acquired by *C* over *B's* land does not give *C* any right *to B's* land or *to* any *corporeal* interest therein; but *C* acquires an irrevocable incorporeal right over *B's* land to *do* something or to *prevent* something being done on such land, for the beneficial enjoyment of *C's* own lands. Under particular Acts (*e.g.* Act XIV of 1859 and the Statute of Frauds) an easement may be treated as an *interest* in land, but a mere license is never so treated. A license is a right *in gross* granted to the licensee to *do*, upon the licenser's immoveable property,[8] something

[7] Gaio, pp. 482, 633; Innes' Digest, 54. In the English law, the term "nuisance" is applied to *both* classes of annoyances. Strictly speaking, the term should be confined to the *first* class of annoyances.

If the transmission of impure air from *A's* land is submitted to for twenty years by his neighbour *B*, *A* acquires an easement inconsistent with *B's* natural right.

[8] See Ch. VI, Act V of 1882. There may be a license to do a thing upon the licensee's *own* land, *e. g.*, to build on his land so as to obstruct the licenser's easement over such land. A loan of specific *moveable* property often amounts to a mere license. A license to practise a profession has

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which would be otherwise unlawful. This right of the licensee is revocable at the pleasure of the licenser (except under certain circumstances),[9] is not enforceable against the licenser's transferee, and cannot, in general, be transferred by the licensee or exercised by his servants or agents.[10] A right of easement cannot be revoked at the will and pleasure of the grantor.[1] It is available against all the world, and may be transferred by the party entitled thereto along with the land to which it is appurtenant. A servitude may be appurtenant or in gross, an easement is a right appurtenant, while a license is a right in gross. An easement may be positive or negative, while a license is only positive. An easement is, generally, permanent, while a license is generally temporary. Besides, a license to do acts may be determined *individually* as well as by class, while an easement is a right to put the land generally to uses of a definite *class*, and not merely to uses determined specifically or individually.[2] *A*

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nothing to do with any *property*. These, however, are not 'licenses' within the meaning of Act V of 1882.

[9] A license *may* be called a *right*, because it has a continuing incorporeal existence *so long* as it is not revoked by the grantor, and also because its enjoyment cannot be hindered by strangers (see Goddard, p. 4). "A license merely excuses the act when done, is retrospective, and not prospective, in its operation; it begets no obligation on the part of the licenser to keep it in force, and may, therefore, be revoked by him at any moment." Phear on Rights of Water, p. 58. But a license is not revocable *if* it is *coupled with an interest* (*i.e.*, coupled with a transfer of a right of property). or if the licensee has *executed* a work of a permanent character and incurred expenses. See sec. 60, Act V of 1882.

[10] A license to attend a place of public entertainment is, in general, transferable; sec. 56.

[1] In one case only, *viz.*, where the grantor reserves a power to revoke, an easement may be revoked by him; sec. 39, Act V of 1882.

[2] Austin, Lecture, 49.

may have *B's* permission or license to enter or walk over *B's* land once or twice, but such right over *B's* land cannot amount to an easement or a servitude. The privilege of doing *one* particular act on the grantor's land *may* be a license, but cannot be a servitude or an easement. The licensee is entitled to do *or* to continue to do something. But the dominant owner is entitled to do *and* to continue to do something, or to prevent *and* to continue to prevent something being done, upon the servient heritage.[3]

Easements distinguished from customs.

An easement belongs to a *determinate* person or persons in respect of his or their land. A congeries of persons, such as the inhabitants of a locality, unless incorporated as a determinate juristical person, cannot claim an easement. A *customary* right belongs to no *individual* in particular. It may be enjoyed by any who inhabit a particular *locality* for the time being, or who belong to the particular *class* entitled to the benefit of the custom.[4] Easements are, so to speak, *private* rights belonging to particular *persons*, while customary rights are *public* rights, annexed to the *place* in general. A custom for the inhabitants of a particular village to dance or to have horse-races on the land of an individual, or to go on a close and take water from a spring, and other customs, may be valid, if not unreasonable.[5] But the customary right of even an *indi-*

[3] To do and to *continue* to do a thing does not mean the *incessant* or constant doing of the thing. Use perpetually recurring at certain or uncertain intervals is sufficient. The dominant owner should have a right to use the subject an *indefinite number* of times. Austin, Lecture, 49.

[4] Goddard, p. 17.

[5] Gale, p. 20. A right claimed by all the villagers to a profit *a prendre* over another's land cannot exist by custom or prescription. Such a

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*vidual* of the class is not an easement, unless by virtue of the custom he becomes entitled to an independent right *in respect of his estate* situated in the locality to which the custom belongs, and the right is beneficial to the occupation or enjoyment of such estate.[6] The illustrations to sec. 18 of Act V of 1884 shew that an independent right, to graze one's cattle on the common pasture, or to prevent interference with privacy, may be acquired, in virtue of a local custom, as an easement in respect of some property within the locality to which the custom applies. An easement of this sort is called 'a customary easement.'[7]

Easements distinguished from rights *in gross.*

An easement cannot be severed from the land to which it is annexed and made a *right in gross.*[8] It cannot be transferred *apart* from the dominant heritage.[9] In order to constitute a valid easement, there must exist two tenements or heritages—the servient

claim is *unreasonable.* See Lord Rivers *v.* Adams, 3 Exch., 361; and Luchmiput *v.* Sadatullah, 12 C. L. R., 382.

[6] Goddard, pp. 19, 20, and 13.

[7] In England, a variable and fluctuating body, like the inhabitants of a certain locality, cannot claim a profit *a prendre in alieno solo*, even by custom. Illustration (*a*) of sec. 18, Act V of 1882, however, would seem to recognize such a claim. In Goodman *v.* Mayor of Saltash, at p. 669, 7 App. Cas., Lord Fitzgerald questioned the wisdom of the English law on this subject as laid down in Gateward's case. But the Calcutta High Court in Luchmeeput *v.* Sadaulla, I. L. R., 9 Calc., 698, considered such a custom unreasonable and therefore invalid.

[8] Goddard, p. 10. The *benefit* of an easement passes *with* the dominant tenement, as the *burthen* of it passes *with* the servient. 9 L. R., Ch. App., 474.

[9] Sec. 6, Act IV of 1882. But the owner of one heritage may *grant* an easement to the owner of a neighbouring heritage. An easement may be granted separately, and apart from any conveyance of the would-be dominant heritage when such heritage *already* belongs to the grantee. Few cases, however, are to be found in the books of an instrument granting an easement *per se.* Gale, p. 84.

and the dominant.[10] There must be the land *a qua* and the land *in qua*. If a person prescribes for an easement, he must claim it 'in a *que* estate' (that is, in himself and those whose *estate* he holds[1]), and claim *such things only* as are incident or appurtenant to lands, for it would be absurd to claim anything as an appurtenance to an estate with which the thing claimed has no connection.[2] The easement (whether acquired by grant or prescription) must be for the beneficial enjoyment of the dominant *heritage*, and not for some *general* benefit of its owner, *unconnected* with the enjoyment of such heritage.[3] The expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity. A right to let off, upon the neighbouring land, water which had been rendered noxious by a particular use thereof on the dominant premises, may be acquired as any other easement; but a claim by the owner of a house to discharge foul water *simpliciter* cannot be claimed as an easement.[5] A right to cut wood on another's land is not an easement, unless the wood when cut is to be used on or for the benefit of a dominant heritage.[6]

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[10] "Probably, however, in the English as in the Civil law, the grant of an easement in respect of a house *about to be* built or purchased, by the grantee, would enure as such." (Gale, p. 11.)

[1] Not in himself and his *ancestors*. An easement passes *with* the dominant estate to the owner of such estate. A servitude *in gross* passes to the heirs and legal representatives of the person who acquires it.

[2] Wharton's Law Lexicon.

[3] Broom and Hadley, Vol. II, p. 33; Gale, p. 14; sec. 21, Act V of 1882.

[4] Sec. 4, Expl., Act V of 1882.

[5] See Wright *v.* Williams; Gale, p. 271; and Bailey *v.* Stevens; Broom and Hadley, Vol. II, 34.

[6] Goddard, p. 14; Illustration (*d*), sec. 4, Act V of 1882.

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Where an alleged easement has no connection with the enjoyment of a particular heritage, it is a servitude *in gross*—a personal right which cannot be *assigned* to another person,[7] except perhaps by the *ordinary conveyances* known to the law.

Public ways.

*Public* rights of way which *all* persons in the empire are entitled to use at their pleasure, *irrespectively* of the ownership of any *estate*, are *rights in gross*, and not appurtenant. Besides, a public road or highway is, in fact, a dedication to the public of the *occupation* of the surface of the land for the purpose of passing and repassing, while in the case of an ordinary easement, the occupation remains with the owner of the servient heritage, subject to the easement.[8] The ordinary rules for the acquisition of easements by positive prescription do not apply to public roads or highways.[9] The evidence of user offered by

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[7] Ackroyd *v.* Smith; Goddard, pp. 8, 14. See note 8, *infra*.

[8] See Lord Cairn's judgment in Rangeby *v.* The Midland Railway Company; Goddard, pp. 8 and 68; Illustration (*e*) under sec. 4, Act V of 1882.

[9] The public as an *indeterminate* and *variable* body cannot claim an easement. (Luchmiput *v.* Sadabulla, 12 C. L. R., 382.) The Indian Easements Act does not apply to such rights of the public, for the further reason that such rights are *not appurtenant*. This Act does not apply even to profits a prendre *in gross*. Assuming that a profit *in gross* is capable of being assigned, it can *only* be assigned (by the person who has acquired it) by the *ordinary conveyances* known to the law. Bailey *v.* Stevens, cited in Goddard on Easements, p. 14.

Highways, thoroughfares, & towing-paths.

The term 'highway' includes all public ways. A highway stopped at one end would cease to be a 'thoroughfare.' (See 2 Smith's Leading Cases, notes to Dovaston *v.* Payne.) A way to a parish church, or to the common fields of a village, which terminates there, may be called a private way. But a way claimed for all the inhabitants of a large city has been held to be a public way. Gale, pp. 338, 339. Where the privilege to use a road is enjoyed only by one particular section of the community, or by the inhabitants of two or three villages, and *not* by others, the road is a private road. Sham *v.* Monee, 25 W. R., 233. "Once a highway always a highway." 2 Smith's Leading Cases, p. 151. Even Municipal

a party in support of his claim to use such roads as *one of the public*, need not prove a twenty years' enjoyment. It is sufficient if acts of user by the public are shewn to have been acquiesced in by the owner or owners of the land over which the roads pass, and that those acts are of such a character as to warrant the inference that the owner or owners intended to make over to the public the right to use the land as a public highway.[10] Eight and even six years have been held to be time enough wherein to presume the dedication from user.[1]

Corporation cases.

Where the inhabitants of a town, or a section of them, claim rights of recreation, &c., over land vested in the municipal corporation of the town as their trustees, the rights claimed are not servitudes or rights *in alieno solo*.[2]

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Commissioners in whom highways are vested cannot stop a highway. Empress *v.* Brojonath, I. L. R., 2 Calc., 425. Where an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, the Civil Court may order the removal of such obstruction. Rajkumar *v.* Sahebzada, I. L. R., 3 Calc., 20. The dedication of a highway *may* be *subject* to certain rights of the owner or of others (Gale, p. 484). As to the right of the owner, see Jaggomoni *v.* Nilmoni, I. L. R., 9 Calc., 75. A public river is a highway. A nation possessing only the upper parts of a navigable river, is entitled to descend to the sea without being embarrassed by useless and oppressive duties or regulations. (Kent's Commentaries, Lecture II, p. 37.) The banks of even public rivers may be, and constantly are, private property, over which there may be public rights of passage for the purposes of navigation. (Rooplall *v.* The Dacca Municipality, 22 W. R., 276.) In Ball *v.* Herbert, 3 Term Rep., 253, it was held in England, against the doctrines of the civil law, that the public had no natural or common law right to tow on the banks of navigable rivers. But Beng. Reg. XI of 1825, sec. 5, recognizes the public right of tracking or towing boats on the banks of navigable rivers. These towing-paths are of the nature of highways.

[10] J. Anderson *v.* Juggudamba, 6 C. L. R., 282.

[1] Smith's Leading Cases, Vol. II, p. 152, 8th Edn.

[2] 7 App. Cas., p. 643. Such rights are rights *in gross*.

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Easements distinguished from other incorporeal rights.

Easements are imposed upon corporeal property for the benefit of other corporeal property.[3] But the easements themselves are 'incorporeal things.' *All* rights are intangible or incorporeal. But rights considered as themselves the *subjects* of ownership may be, and often are, treated as *things*. Certain rights have, as it were, become solidified into so compact and distinct a body that they are looked upon almost as tangible objects, and as capable of being owned by a person as any corporeal thing.[4] These 'incorporeal rights,' as they are also called, are either rights over *determinate* things, or rights *without* any *determinate* subject. All servitudes and easements are rights over determinate lands or over determinate things permanently attached to the earth. But a monopoly, a copy-right, and a patent-right, though 'incorporeal rights,' are not rights over determinate things. So the right of levying a toll at a certain bridge or ferry is an 'incorporeal right' without a determinate subject.[5]

Monopolies, patent-rights, copyrights, ferries, &c.

'Incorporeal rights' are generally rights *in rem*.[6]

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[3] Gale, pp. 5 & 8; sec. 4, Act V of 1882. But see Gale, pp. 9, 10.

[4] Amos, Science of Law, p. 168.

[5] Austin, Lecture XV and Table VIII. But the right of the owner of the ferry, so far as it involves a right to embark and disembark passengers on the landing-place in another's soil, is a right in the nature of an *easement*. (I. L. R., 6 Calc., 608, 613.)

[6] A right to an annuity charging the *person* of the grantor, but payable to the grantee and his heirs, is an instance of an incorporeal right or hereditament, being a right *in personam*. A profit *a prendre in gross*, though *personal* in one sense, is a right *in rem*. (See Gale, pp. 11 and 13, note.)

*Hauts* and markets.

In English law, Patent-rights and Copy-rights are called Incorporeal Chattels, while Easements and Profits are called Incorporeal Hereditaments. The right to establish a market or hold a haut on land, though an 'incorporeal right' and a franchise in England, is, when exercised upon

But there may be rights *in personam* which *concur* with the rights *in rem*. The rights answering to the obligations on the persons who happen to traverse the bridge are rights *in personam*. The rights corresponding to the obligation not to impede the levying of the toll, or the passage over the bridge, or the obligation not to carry passengers across within the limits of the ferry, are rights *in rem*.[7]

When it is said that an easement is an 'incorporeal right,' all that is meant is, that it is not a right to the *soil* of another's land, nor to any corporeal interest in such land, though it creates an obligation or duty which attaches upon, or is annexed to, the land. The right to take minerals out of the soil of another is an incorporeal right,[8] but the right to a stratum of minerals is a corporeal right, the subject of the former right is a profit out of another's land, of the latter a part of the soil itself. The holder of a right of easement cannot exclude the owner of the soil from *all* the benefit derivable from it.[9] It is a right severed from the larger right of ownership and possession.[10] It does not wholly deprive the servient owner of his right of using his property, nor does it deprive him of his right of disposition or alienation.

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one's own land, an ordinary right of property in India, subject, of course, to temporary control by the Magistrate under certain circumstances: see Kedarnath *v.* Rughonath, 6 N. W. P., 104; Gopimohun *v.* Taramoni, 4 C. L. R., 309; I. L. R., 5 Calc., F. B. As to the right to set up a private ferry in a river, see Bursa *v.* Mahomed, 7 C. L. R., 504; I. L. R., 6 Calc., 608.

[7] Austin, Lecture XV. and Table VIII.

[8] Gale, p. 9.

"A right to *all* the coal lying under a particular close is a corporeal right, because it is a right to a part of the soil." Goddard, p. 5.

[9] Goddard, p. 5; Buszard *v.* Capel, 8 B. & C., 141.

[10] Montriou, p. 64.

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Certain incorporeal rights how acquired.

Incorporeal rights amounting to a profit *a prendre in gross*, or to an exclusive right to set up a private ferry in a river, though not easements within the meaning of Act V of 1882, bear a closer analogy to easements than to property, and it has been held that they may be acquired by grant *as well as* by *twenty* years' user or enjoyment.[1]

Trees encroaching on a neighbour's land.

But *all* incorporeal rights cannot be so acquired. If the roots or branches of a tree growing on *A's* land encroach on *B's* land, *B* is not compelled to submit to such encroachment except where he has *granted* such an easement to *A*. A right of this kind, although it is of the nature of an easement, cannot be acquired by prescription, either because the user is secret (*i.e.*, not *open* as required by the law of prescription), or because the burden of the easement is liable to a *perpetual change*.[2]

All restrictions are not servitudes or easements.

We have seen that, with regard to the *dominant* heritage, an easement is a new right or quality *superadded* to the ordinary (and natural) rights of property, and that with regard to the *servient* tenement, it is an obligation or burden which *curtails* such rights. When certain obligations or restrictions are imposed on *all* tenements by the general principles of law (such as that expressed by the maxim *sic utere tuo ut alienam non lædas*),[3] or by any Municipal law, for the general benefit of the community, they

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[1] Chundi *v.* Shib, 6 C. L. R., 269; I. L. R., 5 Calc., 945; and Bursa *v.* Mahomed, 7 C. L. R., 504; I. L. R., 6 Calc., 608.

[2] Gale, p. 524. As to clippings falling on *A's* land from poisonous trees on *B's* land, see Crowhurst's Case, 4 Ex. Div., 5.

The twenty years' rule has not also been applied to public ways. See p. 365, *supra*.

[3] "Use your property so as not to injure others."

are not easements. They are restrictions subject to which the ordinary and natural rights incidental to the ownership of property must be exercised by *all* owners of property in the State. In the case of *easements*, the restrictions are *specially* imposed for the benefit of determinate tenements or heritages by some particular act or incident. An obligation imposing a restriction on the use of a particular heritage, arising out of a *contract* as opposed to a *grant* or transfer, is also not an easement.

No easement consists *in faciendo.*

Easements being mere *restrictions* of the *rights* incidental to the ownership of property, impose on the owner or occupier of the servient tenement *negative duties* to suffer or forbear.[4] No right of easement can consist *in faciendo*,—*i.e.*, consist in a right to an *act* or *acts* to be performed by the *servient* owner or occupier. If it consisted in a right to an *act* to be done by the owner or other occupant, it would be merely a right *in personam* against that determinate party, and not a right *in rem.*[5] An

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[4] Strictly speaking, easements are imposed upon the *property*, and not the *owner* of it. Tudor's Leading Cases (Sury *v.* Pigot). p. 168 ; Statement of Objects and Reasons, Gazette of India, 13th November 1880, Part V, p. 477.

Liability to repair walls and embankments.

[5] Austin, Lecture, 49 ; sec. 27, Act V of 1882. The servient owner cannot be required to cleanse a drain or to keep in repair a wall. If he is under any obligation to do so, it is not in consequence of any easement properly so called. A local usage may impose such an obligation. Under the common law of this country there is no liability cast upon a riparian proprietor to construct or keep in repair embankments for the protection of adjoining landholders, and the mere fact that he has always maintained an embankment is not sufficient to establish a *prescriptive liability.* See Nuffer *v.* Jotindro, 9 C. L. R., 553, 567, 569. Repeated acts of repairing *another's* building, tank, &c., cannot give an exclusive right to repair. (See Muttaya *v.* Sivaraman, I. L. R., 6 Mad., 229, 236.) A right which imposes on the servient owner a positive duty

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easement being a right *in rem*, remains unchanged, although the servient heritage is possessed by a person other than the owner and adversely to such owner.[6] So long as the easement continues to exist, it avails against strangers as well as against the successive owners of the servient tenement.

*Nulli res sua servit.*

It follows from the nature of easements as definite accessorial rights *subtracted* from the indefinite rights of user and exclusion which reside in the owner of the servient heritage, that no person can have an easement in a tenement of which he himself is the owner. *Nulli res sua servit.*[7] The servient heritage must be distinct from the dominant heritage, and the two heritages must not belong to the same individual. If the two heritages are owned by the same person, "he has a right as owner to use each in whatsoever manner he finds most convenient to himself, and he may make the one tenement servient to the other simply because it is his own; in whatever manner, therefore, he exercises his right, he exercises it in his capacity of owner of the soil, and the right he exercises is not an easement but a proprietary right incident to the ownership of land."[8] As Lord Hatherley, Chancellor, said:—"You cannot have the land itself and also an easement over

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to do is a *spurious* easement; see Gale, p. 516; see also sec. 4, Illus. (*f*), and sec. 24, Illus. (*f*). The *dominant* owner may be entitled to a positive *right* to *do* something.

[6] Austin, Lecture, 49. Even "in the case of a *negative* servitude, it is *possible* for a stranger (*e.g.* a trespasser) to *do* the act which would prevent the enjoyment of the servitude, *e.g.* to build up, or otherwise obstruct ancient lights."—Student's Austin, p. 395.

[7] Austin, Lecture, 50.

[8] Goddard, p. 10.

it."[9] It is on this principle that an easement is *extinguished* when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.[10] And where the *owner* of a particular tenement holds another tenement as a *lessee* under another person, he cannot acquire for the benefit of the former an easement over the latter.[1] When the owner of either the dominant or the servient tenement becomes entitled to possession for a *limited* interest in the other tenement, the easement is *suspended*, but it revives if the 'unity of possession' ceases to exist before the right is extinguished by long non-enjoyment.[2]

Servient owner cannot require easement to be continued.

An easement being a right or privilege acquired for the convenient or beneficial enjoyment of the *dominant* heritage alone, its exercise may be discontinued by the dominant owner. The servient owner has no right to require that an easement be continued.[3] No

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[9] Ladyman *v.* Grave, L. R., 6 Ch. Ap., 763, 767. It is on this principle that a tenant cannot acquire an easement by prescription in land belonging to his landlord. Goddard, p. 11.

[10] Sec. 46, Act V of 1882. A *necessary* easement is *suspended*, rather than *extinguished*, by 'unity of ownership.'

[1] Kristna *v.* Vencatachella, 7 Mad., 60, 64; sec. 12, Act V of 1882. But a tenant may acquire as against another tenant of the same landlord an easement which will continue so long as their leases continue; see Goddard, pp. 11 to 13. Sec. 8, Illus. (*d*), and sec. 37, Illus. (*c*), Act V of 1882, show that such defeasible easements may be *imposed* or *granted*. And a tenant of *A* may acquire on behalf of *A* an easement against another landlord (see sec. 12, Act V of 1882). An easement acquired by *prescription* against a lessee of *A* becomes absolute and indefeasible, unless the claim is resisted by *A* within three years of the expiration of the lease. See sec. 27, Act XV of 1877, and sec. 16, Act V of 1882.

[2] See secs. 49 and 51 of Act V of 1882.

[3] Sec. 50, Act V of 1882. The section gives the servient owner a right to sue for *damages* in case he has not received such a notice of the extinction or suspension of the easement as would enable him, without unrea-

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No reciprocal easements.

*reciprocal* or *counter*-easement can be acquired for the benefit of the servient tenement by the user or exercise of the easement by the dominant owner.[4] The flow of water for twenty years from the eaves of a house cannot give the owner of adjacent lands a right to insist that the house shall not be pulled down or altered, so as to diminish the quantity of water flowing from the roof.[5] The flow of liquid manure from a drain on *A's* land for twenty years cannot give his neighbour a right to preclude *A* from altering the level of his drain and applying the manure to his own purposes.[6] An easement imposes a *burden* on the servient tenement for the *sole benefit* of the dominant tenement; and the right of the dominant owner to get rid of what at the time is a nuisance to his property, does not give the servient owner a right to compel the *continuance* of the flow for his own benefit. The use or enjoyment of the water or manure by the servient owner is not of right, but only so long as the particular purpose for which the easement exists is served.[7] The state of circumstances in such cases shows that the

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sonable expense, to protect the servient heritage from the possible effects of the extinction or suspension.

Cross-easements.

[4] Goddard, p. 15. But there may be *cross*-easements of support in the case of a party-wall, one determinate moiety of which belongs to one owner, and the other moiety to another; see Gale, p. 513, note; and Watson *v.* Gray, 14 Ch. Div., 192. See p. 351, note 10, *supra*.

[5] Wood *v.* Waud, 3 Exch., 78. The same principle applies to water (naturally) falling on one's land, when it does not pass in a *defined* channel. If such water is allowed to flow into a neighbour's land, such neighbour cannot acquire a *prescriptive* right to the use of the water so as to be able to prevent the other from stopping the flow. See Bunsee *v.* Kalee, 13 W. R., 414.

[6] Greatrex *v.* Hayward, 8 Exch., 291.

[7] See Mason *v.* Shrewsbury, L. R., 6 Q. B., 578; Gale, pp. 313, 316; Goddard, p. 15.

Artificial water-courses.

*artificial* watercourse originating in the mode of occupation or alteration of a person's property is not of a *permanent* nature, but liable to variation, and that the originator of the watercourse never intended to give, nor the servient owner to enjoy, the use of the water, &c., as a matter of *right*.[8]

How far the causes of easements must be permanent.

By the civil law, the causes of easements must be perpetual, so that the qualities impressed upon the dominant and servient tenements might be in their nature *permanent* and capable of continuing in their present condition for an indefinite period.[9] It has been held, in England, that a *prescriptive* easement of light cannot be acquired in respect of the window of a workshop built upon posts in such a way as not to be *permanently* attached to the earth.[10] It has also been held, that such a right cannot be acquired to the flow of water against the originator of an *artificial* stream created manifestly for a *temporary* purpose.[1] In Goddard on Easements,[2] it is laid down that no *prescriptive* easement can be acquired unless the dominant and servient tenements, as well as the subject of the easement (*i.e.* the advantage or convenience claimed), are permanent in their character. Act V of 1882 enacts that the dominant as well as the servient tenement must be land or things *permanently* attached to the earth.[3] This provision

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[8] Wood *v.* Waud, Gale, p. 311. See Ramesur *v.* Koonj, I. L. R., 4 Calc., 633, P. C., as to prescriptive easements in respect of artificial reservoirs and channels. See also I. L. R., 7 Mad., 530.

[9] Gale, p. 18.

[10] Maberley *v.* Dowson, 5 L. J., K. B., 261; Goddard, p. 147; Innes' Digest, 2.

[1] Gale, p. 311; Goddard, p. 148; I. L. R., 4 Calc., 633, P. C.

[2] 2nd edition, p. 147.

[3] Sec. 4, Act V of 1882.

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applies to all easements, whether prescriptive or not. But it is *not necessary*, either under the English law or under Act V of 1882, that the easement itself should be *permanent*. An easement for a limited time, or an easement on condition (precedent or subsequent), may be imposed by *grant*.[4] At page 64 of the Madras High Court Reports, Vol. VII, one of the Judges says: "An easement implies an absolute outright grant to some person of an incorporeal right as appurtenant to his corporeal property. Such a grant cannot be conceived as made to a mere tenant in respect of a tenement in which his interest is precarious."[5] But under Act V of 1882, an easement is not necessarily an absolute outright grant. Lessees of the same lessor may acquire against each other by grant, if not by prescription, a right of way or other easement co-extensive with the period of years during which the two leases jointly continue in force.[6] But the rights of one tenant against another in a case like this are not easements in the *ordinary* acceptation of the term.[7]

Indivisibility of easements.

Easements are so far *indivisible* that they cannot be acquired, exercised or lost in respect of an *ideal part* of a heritage. One of two co-owners cannot, without the consent of the other, impose an easement

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[4] Sec. 6, Act V of 1882; Goddard, p. 89.

[5] The interest of the tenant in this case was defeasible for non-payment of the assessment imposed upon it.

[6] Sec. 8, Illus. (*d*), Act V of 1882. And a lessee whose interest is *permanent* and *transferable* may, of course, impose an easement over land held by another like lessee of the same landlord; but such easement is liable to be extinguished by a sale for arrears of rent of the servient holding. Sec. 37, Illus. (*d*).

[7] Daniel *v.* Anderson, 31 L. J., Ch., 610; Goddard, p. 12.

on the joint property or any part thereof, but he may acquire an easement for the beneficial enjoyment of the *whole* of such property. When the dominant heritage is divided or partitioned, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage. When the dominant owner exercises, for twenty years, a right less extensive than that to which he is entitled, his easement is not reduced to the right actually exercised.[8]

Easements affirmative or negative.

It is usual to speak of easements as either affirmative or negative. An *affirmative* or *positive* easement authorizes the dominant owner (that is, the owner or occupier of the dominant heritage) to *do* something in, upon, or in respect of the servient heritage. The acts the commission of which is authorized, would ordinarily, if the easement did not exist, give the servient owner (that is, the owner or occupier of the servient heritage) a cause of action, or a right to sue for trespass or nuisance.[9] A right of way, or a right to pollute air or water, is an affirmative easement.

A *negative* easement entitles the dominant owner (not to *do* anything, but) to *prevent* something being done in, upon, or in respect of the servient heritage. The exercise or enjoyment of the easement is of such

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[8] Gazette of India, 13th November 1880, Part V, pp. 478, 479; secs. 8, 12, & 30 of Act V of 1882.

[9] For the distinction between positive and negative easements, see Gale, p. 22. Negative easements can under no circumstances be interrupted except by *acts* done upon the servient heritage. The exercise of affirmative easements (before the rights are acquired) may be the subject of legal *proceeding* as well as of physical interruption. (Sturges *v.* Bridgman, 11 Ch. Div., 852.)

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a character that it would not, even if the easement did not exist, give the servient owner any cause of action. An easement annexed to *A's* house to receive light and air by its windows, without obstruction by his neighbour *B*, is a negative easement. This prevents *B* from exercising his right to build on his own land to the obstruction of the easement.

There is no *purely* affirmative or negative easement.

It is only as regards the *dominant* owner that this division of easements into positive and negative is possible. For, as regards the servient owner, the obligation or duty is *always* negative. The servient owner is never bound to do anything; his duty is to *forbear* from using the subject in a given manner or mode. And it should be observed that, even as regards the dominant owner, no affirmative easement is *purely* positive, for such an easement gives him a right to *do* certain acts over the given subject, *as well as* a right to *prevent* the servient owner and others from molesting him in the performance of those acts. And although the idea of a negative easement is, that it gives the dominant owner *merely* a right to *forbearances*, that is, merely a right to *prevent* something being done upon the servient heritage, yet such an easement is not *purely* negative, for even in such a case, the dominant owner *may* be said *to put the servient heritage to certain uses.*[10] The easement of support for buildings from the subjacent or adjacent soil of the servient heritage, is generally spoken of as a negative easement, but it is inaccurate to describe it as one of a *merely* negative kind. The dominant tenement *positively* imposes upon the servient a constant burden,

[10] See Austin, Lecture, 49.

the sustenance of which, by the servient tenement (vertically or laterally), is necessary for the safety and stability of the dominant. The right to light is *more purely* negative.[1] The same remark applies to the customary easement to restrain interference with privacy.[2] It is more purely negative than a right to support. A right to the uninterrupted flow of a stream in a *permanent* artificial channel, against the originator of such channel, is another instance of a negative easement. In these three cases nothing positive is done in or upon the land of another man, but the dominant owner does nevertheless put the servient heritage to certain uses. A right to discharge water by a spout or projecting eaves, on a neighbour's land, is an affirmative easement so far as something positive *is done* in or upon the servient heritage, and a negative easement, so far as the servient owner is bound to *refrain* from exercising his right to build on his land so as to prevent the discharge. Similarly, *A's* right of way over *B's* land *restrains B* from treating *A* as a trespasser, and from building on his land to the obstruction of the easement.

Austin, in his lectures, doubts if there is any scientific foundation for the distinction of easements into positive and negative, and Lord Selborne, in *Dalton* v. *Angus*, seems to be of the same opinion.

Easements continuous

Easements are either *continuous* or *discontinuous*.

[1] See Lord Selborne's judgment in Dalton *v.* Angus, 6 App. Cas., 740, at pp. 793 and 797. The adverse enjoyment of support gives, at least *theoretically*, a cause of action. See pp. 764 and 784, *ibid.*

[2] Illus. (*b*), sec. 18, Act V of 1882. For the old law on the subject of *privacy*, see Mahomed *v.* Birjoo, 14 W. R., 103, and the cases cited therein. See also 18 W. R., 14.

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or discontinuous.

A continuous easement is one whose exercise or enjoyment is continual, or may be continual without the act or actual interference of man, as a right to light and air, a water-spout, &c.[3] A discontinuous easement is one that needs the act of man for its exercise. It can be enjoyed only by a fresh act on each occasion of its exercise, as a right of way, or a right to draw water.[4] Discontinuous easements are more purely *positive*, and some continuous easements more purely *negative*, in their character.

Apparent or non-apparent.

Easements are also either *apparent* or *non-apparent*. An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him. Its existence is shown by some external work, such as a window, a spout, a gutter or other watercourse.[5] A non-apparent easement is one that has no such sign, as a right to prevent the servient owner from building on particular land, or from building above a certain height.[6] The Roman law further divides easements or real servitudes into *urban* and *rustic*—adivision which has no scientific precision.[7] An urban servitude is appurtenant to a *building*, and therefore occurs most frequently, though not necessarily, in a city or town, as a right to the access of light to windows. A rustic or rural servitude is appurtenant to *a parcel of land*, and therefore occurs most frequently in the country, as an easement annexed to *A's* field to thresh grain on *B's* field. But there may be rustic servitudes in towns and

Urban or rustic.

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[3] Gale, p. 25; sec. 5, Act V of 1882. [4] *Ibid.* See also Innes' Digest, 4.
[5] *Ibid.* [6] *Ibid.* [7] Austin, Lecture, 50.

cities, as there may be urban servitudes in the country.



Inconsistent and subordinate easements.

Two wholly *inconsistent* easements cannot co-exist in respect of the same servient heritage or tenement, but one *subordinate* easement of a character inconsistent with another *superior* easement may co-exist, if the former does not lessen the utility of the latter.[8] Thus, if *A* has appurtenant to his house a right of way over *B's* land, *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way, *provided* that *A's* right of way is not thereby obstructed.[9] Here *C's* easement is *subordinate* to *A's* right of way. Under Act V of 1882,[10] the servient owner cannot, without the consent of the dominant owner, *impose* an easement on the servient heritage which would lessen the utility of the existing easement, and although there is no *express* prohibition against the acquisition by *prescription* of two absolutely inconsistent easements, over the same servient heritage, by two different persons, such acquisition is *not possible*, by reason of the enjoyment of either easement being an obstruction to the actual enjoyment of the other.

Accessory or secondary easements.

The right of the dominant owner as against the servient owner to do *all acts necessary* to secure the full enjoyment of the easement is, as if it were, *appurtenant to the easement.* Mr. Gale calls this right a *secondary easement* as distinguished from the *primary* easement.[1] Act V of 1882 more accurately calls rights of this nature *accessory rights.*[2]

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[8] Goddard, pp. 24 and 25. [9] Illus. (*b*), sec. 9, Act V of 1882.
[10] See sec. 8. [1] Gale, p. 549. [2] Sec. 24; p. 442, *infra.*

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'Natural Rights' originated from the disposition of nature and the wants of society; and in the course of time 'easements' were *stipulated for* by private persons as matter of utility, or even pleasure.[3]

Every system of law recognizes servitudes.

In *Bagram* v. *Khetter Nath Karformah* (3 B. L. R., O. C., 18, 37) Justice Norman says:—"The laws of every country must necessarily recognize servitudes. It has been well said (by Pardessus) that the origin of servitudes is as ancient as that of property, of which they are a modification. It seems clear that servitudes were known and recognized both by Hindu and Mohammedan law."

Mahomedan Law.

It appears from the Hedaya, that a right in the nature of an easement is acquired by one who digs a well in waste ground, *viz.*, that no one shall dig within a certain distance of it so as to disturb the supply of water. Rights to the use of water for purposes of irrigation or drainage are also recognized and defined. And one urban servitude, at least, is mentioned, *viz.*, the right to discharge water on the terrace of another.[4] In Halhed's Gentoo (Hindu) Law, which is a translation of a compilation of the ordinances of the *Pandits*, made under the direction of Warren Hastings, between 1773 and 1775, it is laid down, that "if a man hath a window in his own premises, another person having built a house very near to this and living there with his family hath no

Hindu Law.

[3] Pardessus, cited in Gale on Easements, p. 3.

[4] See 3 B. L. R., O. C., 37; Hamilton's Hadaya, Vol. IV, pp. 132 to 155. The Hon'ble Sayyad Ahmad Khan, in his speech in the Legislative Council (16th February 1882), said: "The subject of easements is no novelty to the Musalman mind. Easements are familiar to them, and their law-books are full of rules, in regard to what are termed by Muhammadan lawyers as *neighbours' rights*."

power to shut up that man's window; and if this second person would make a window to his own house on the side of it, that is, towards the other man's house, and that man at the time of constructing such window forbids and impedes him, he shall not have power to make a window. If the drain of a man's house hath for a long series of years passed through the buildings belonging to another person, that person shall not give impediment thereto."[5] Many other species of servitudes, such as those relating to the use of pools or wells, eaves-droppings, and pathways, are referred to in the same book.[6] In treating of 'contest regarding boundaries,' the *Vivad Chintamoni* mentions easements concerning windows, water-courses, verandahs, cornices, thoroughfares, &c.[7]

Servitudes recognized by the Civil law.

The following, among other servitudes, were recognized by the Civil law:[8]—

*Via*, the right to use a way for *any* purpose.

*Actus*, the right of passage for beasts or vehicles, which included *iter*.

*Iter*, the right of going or passing for a man, on foot or horseback.

*Aquæ ductus*, the right of conducting water (*aquæ ducendæ*) through the land of another.

*Onera vicini sustineat* and *paries oneri ferendo*, by which the servient tenement was obliged to support the weight of the dominant edifice.

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[5] See 3 B. L. R., O. C., 37; Halhed's Gentoo Code, 185.

[6] See Halhed's Gentoo Code, Chapter on Boundaries and Limits, pp. 181—186.

[7] See Prossunno Coomar Tagore's Translation of the Vivad Chintamoni, pp. 124—127.

[8] See Sandars' Justinian, Book 2, Title 3; Gale on Easements, 5th Ed., pp. 269, 274, 328, 329, 392, 393, 534, 538, and 572.

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*Tigni immittendi*, the right of inserting a beam of one house into the wall of a neighbouring house.

*Stillicidii vel fluminis recipiendi*, the servitude of receiving the rain-water of the dominant heritage in *drops* from the eaves, or in a *current* by a spout or gutter—of receiving the *stillicidium* or *flumen* of the dominant owner.

*Altius non tollendi*, by which the servient heritage was prohibited from being raised above the dominant heritage.

*Jus luminum* and *ne luminibus officiatur*. The former prevented a neighbour blocking up our lights; the latter prevented his doing anything whereby the light was in any way, however slightly, intercepted from our house.

*Jus projiciendi* and *jus protegendi*, by which a wall or roof, a balcony or eaves, projecting over the boundary line of the servient heritage could not be removed by the servient owner.

*Ne prospectui officiatur*, or the servitude of not hindering or obstructing the prospect of the dominant house.

An easement to restrain interference with privacy is recognized generally in the countries whose system is founded on the civil law.[9]

Easements recognized by the English law.

The following are some instances of easements recognized by the English law:[10]

[9] See the Report of the Law Commission, published in the Supplement to the Gazette of India, January 17, 1880; Domat's Civil Law, Vol. I, Arts. 1043 & 1044. As to the Indian law on the subject of privacy, see 3 Mad., 146; 5 Bomb., 42; 11 W. R., 103; and sec. 18, Act V of 1882.

[10] See Gale on Easements, 5th Edn., pp. 23, 24. Mr. Goddard mentions three other instances: a right to nail trees to a wall; a right to use another's chimney for conveyance of smoke; and a right to tether horses. See p. 74.

Rights of way. Right to make surface uneven by working mines in such manner as to let it down. Right to go on soil of another to clear a mill-stream and repair its banks. Right to go on a neighbour's close and draw water from a spring there, or to water his cattle at a pond, and to take the water thereof for domestic purposes. The right to conduct water across a neighbour's land by an artificial water-course,[1] and to go upon that land for purpose of turning the water into the same. Right to discharge water or other matter on to a neighbour's land. Right to discharge rain-water by a spout or projecting eaves. Right to use or to affect water of natural stream in any manner not justified by natural right. Right to support from a neighbouring wall. A right to drive a pile into the bed of a river for the more convenient use and enjoyment of a wharf. A right to a fender in a mill-stream to prevent a waste of water. A right to have a name-plate on a door. A right to have a sign-post on a common before a public house. Rights to carry on offensive trades, and other easements by which private nuisances are legalized. Right to hang clothes on lines passing over the neighbouring soil. Right to make spoil-banks upon surface in course of working minerals. Right to use close for purpose of mixing muck and preparing manure there for an adjoining farm. Right to bury in a particular vault. Right to pew in a

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[1] The right to artificial watercourses, as *against* the party creating them, depends upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it was created. Gale, p. 311; see also Ramessur *v.* Koonj Behari, I. L. R., 4 Calc., 631, 638, P. C.; Raya *v.* Vira, I. L. R., 7 Mad., 539.

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church.[2] Right to support of buildings by adjacent land or building.[3] Right to receive light and air laterally by windows.

Profits a prendre recognized by English law.

Besides these easements, the English law recognizes, among others, the following *profits a prendre:*[4] A right or liberty which one or more may have to feed their cattle on another man's land. The liberty to cut turves in another's soil to be burnt in a house. The right to take trees, loppings, shrubs or underwood in another's woods, coppices, &c. A right to fish in another's pond, pool or river. A right to hunt, shoot, fowl or fish in another's land or water, and to carry away whatever is so taken. A right to dig clay in another's land for the purpose of making bricks.

The following are some of the most important easements recognized by the Courts in British India:

1. Rights of way (for foot passengers, for boats, for carts, for carrying marriage and funeral processions, for the passage of mehters, &c.)
2. Rights to the flow or use of water, and rights to obstruct or divert the natural flow of water.

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[2] It may, however, be doubted, if the church or the pew in it, independent of the right of sitting in the pew, is, strictly speaking, a *servient tenement*. Some authorities treat this right as only a *quasi*-easement. See Brown, 368, 369.

[3] Lemaitre *v.* Davis, 19 Ch. Div., 281.

[4] See Hall on Rights of Common and Profits a Prendre, and Woodfall's Law of Landlord and Tenant, Chap. 18.

Easements are rights of *accommodation* as distinguished from those which are directly *profitable*. Easements (in the English-law sense of the term) tend rather to the *convenience* than the *profit* of the claimant. A profit *a prendre* is so called because the claimant is entitled to *take* the profit for himself, while a *rent* must be paid or *rendered* by the tenant. Profits lie *in prender*, rents lie *in render*.

3. Rights to light and air.
4. Flumen, stillicidium and jus projiciendi.
5. Rights of fishing, and of grazing cattle. (Profits *a prendre.*)
6. Easements for the exit of smoke through apertures in the dominant heritage, whether such apertures are used for the egress of smoke *only*, or for light and air *as well.*[5]
7. Customary rights to privacy.

May easements not now known to the law be created?

According to Lord Stair, there may be as many kinds of servitudes as there are ways whereby the liberty of a house or tenement may be restrained in favor of another tenement; and Mr. Gale appears to be of the same opinion.[6] There can certainly be no objection for the owner of land to enter into unusual or novel covenants, so long as such covenants are enforceable against him and his representatives, that is, so long as they are answerable in damages only for *breach of covenant.* But it is otherwise, where new modes of holding and enjoying land—incidents of a novel kind—are intended to be impressed upon *the land itself*, so that an unusual and unknown burden is attempted to be imposed on all subsequent owners, whether they are purchasers with notice or not.

A man cannot create a new form of estate or alter the line of succession allowed by law.[7] He must

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[5] Behari Sahoo *v.* Musst. Ajnas, 6 W. R., 86. But Wilson, J. (on the 14th of June 1879), doubted if an easement for the exit of smoke only could be recognized in the Presidency Towns. See Bhowany Churn Mitter *v.* Baney Madhub Dey, reported in the *Englishman* of the 11th of July 1879. See also Bryant *v.* LeFevre, 4 C. P. D., 172.

[6] Gale, 5th Ed., p. 4.

[7] Denobundhoo *v.* Soorjomonee, 4 W. R., P. C., 114; Tagore *v.* Tagore, 18 W. R., 359, 364, P. C.

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be contented to take the sort of estate and the right to dispose of it as he finds the law settled by decisions or controlled by Act of the Legislature.[8] Mr. Goddard, in his treatise on the law of easements, points this out and remarks that the law will not recognize any *new species of easements*, that is, it will not permit a landowner to create easements of a novel character, and *annex them to the soil.*[9] The learned author remarks that a right to uninterrupted prospect (or view *from* a house), or a right to the unobstructed view *of* a house or shop window, or a right to undisturbed privacy, cannot, on this principle,[10] be acquired in England except, perhaps, by

Right to prospect and right to privacy.

[8] Hill *v.* Tupper, 32 L. J., Exch., 217, cited in Goddard on Easements, 2nd Ed., p. 21.

[9] Goddard, pp. 21—23, 73, 74. The following passage from the report of the Law Commission (Ind. Gaz., 17th January 1880) may be referred to, in connection with this subject :—

"Easements, being restrictions on the free use of property in others, are regarded with disfavor by the law; and sec. 7 of the Bill was accordingly framed so as to state the fact that all easements are in derogation of certain natural rights, and to *prevent attempts to create new kinds of easements.* It enumerated the rights of one or other of which every easement must be a restriction, and thus *intentionally excluded every kind of servitude not now known to the law.* This, however, has been objected to on the ground that there may be in some parts of India rights not so enumerated. We admit the possibility, though not the probability, of the existence of such rights; and we recommend that section 7 should be *modified* as follows: . . . ." (The *modified* sec. 7 has been substantially enacted into law. See Act V of 1882, sec. 7.) "Should, for instance," the Commissioners add, "a *natural right* to *lateral* access of light or air, or to the non-diminution of the supply of fish, be hereafter established in any part of India, the section as now modified will *not exclude* an easement in derogation of such right."

[10] See Goddard, pp. 74—76. But the right to undisturbed *privacy* is recognized by the Hindu law, the Civil law, and the customs of Guzerat and other places in India, and the right to uninterrupted *prospect* is not unknown to the Civil law. One reason why the former right is not enforced in England is, that in cases of interference the claimant

an actual agreement or covenant, and that even when so acquired, it should be treated not as an easement annexed to the land for ever, but merely as a personal right for the infringement of which no action can be maintained as for a tort.[1] But the instances given are hardly cases of *new kinds of estate.* But a right of way, not connected in any manner with the enjoyment of the land to which it is attempted to make it appurtenant, purporting to be at the *same time, in gross* and *appurtenant*, is a novel kind of estate which cannot be recognized by law, though such a right in gross *simply*, may be as valid and perhaps as binding as an easement properly so called.[2] The Indian Easements Act, which is mainly[3] based on the

Right purporting to be real and personal at the same time.

has an easier remedy in his own hands. And a prescriptive right to prospect is disallowed, because it is vague, undefined, and too extensive. The same objection applies to a claim to have free access for all the winds of heaven to the sails of a windmill (Webb *v.* Bird), or to a claim to the use of percolating water not accustomed to run in a *definite* channel (Chasemore *v.* Richards). See Dalton *v.* Angus, 6 App. Cas., pp. 759 and 824.

[1] It may be questioned, if the *remedies* for the disturbance of a right *in gross* are not the same as those for the disturbance of an easement proper. See Gale, p. 13; Austin, Vol. II, pp. 831, 850.

[2] Ackroyd *v.* Smith, as explained by Mr. Willes. See Gale, p. 13, note (d).

[3] The following points of *difference* are noticed in the Statement of Objects and Reasons :—

Points of difference between the English and the Indian Law.

(*a.*)—In conformity with continental systems of jurisprudence, but in contravention of the English law, easements under Act V of 1882 *include* profits *a prendre* when they are appurtenant to some heritage.

(*b.*)—A customary easement to restrain interference with *privacy is recognized* by the Indian Act. (See 5 Bomb., 42; 6 Bomb., 143.)

(*c.*)—The express imposition of an easement in British India need not be evidenced by *writing.* (4 Mad., 98.)

(*d.*)—In British India there is no rule, that a way of necessity shall not be varied save with the consent of both dominant and servient owners, or unless the servient owner renders it impassable.

LECTURE XII. law of England, excludes such a right from the category of *easements*. An easement, according to the

(*e*.)—Under 2 and 3 Will. IV, c. 71, where the user of an affirmative easement has continued for *twenty* years only. the fact that the servient owner was *ignorant* of the user or was *incapable* of resisting it is a good defence. In no case of prescription under the Indian Act is ignorance or incapacity a good defence. (See I. L. R., 10 Calc., 214.)

(*f*.)—The Indian Act favors the right to *air* as much as the right to light. It allows a suit for the obstruction of the passage of air where it interferes materially with the plaintiff's physical comfort, *although it is not injurious to his health*. (As to the old law in British India, see 3 B. L. R., O. C., 18; and 15 B. L. R, 68.)

(*g*.)—Under the Act, the dominant owner cannot himself (except perhaps where there is a contrary local usage) *abate* a wrongful obstruction of an easement. (7 Mad. Rulings, xxxv.) (As to the right of the *servient* owner to *obstruct* the excessive user of an easement, see pp. 443, 444, *infra*.)

(*h*.)—In the case of the acquisition of any easement by statutory prescription in British India, it is not *assumed* that a *grant* has been made by the servient owner. In English law, prescription, generally, presumes a (real or fictitious) grant. Prescription at common law, prescription by the theory of a lost grant, and prescription by *twenty* years' user of easements (*other than the right to light*) under the statute assumes such a grant. No prescription arises in these cases if a *grant* is impossible. The servient owner's ignorance of the user is, therefore, fatal to a claim by such prescription in England. (It is said that the right to light is the subject, not of *grant*, but of *covenant*; but Lord Selborne is of opinion that a right to light may be *granted* in the sense of the word 'grant' necessary for prescription. 6 App. Cas., 794.) See I. L. R., 10 Calc., 214, 218.

(*i*.)—The Indian Act lays down *positive* rules for the extinction of prescriptive and other easements, by non-user for twenty years. (For the old law here, see 5 B. L. R., App., 66; 14 W. R., 79, and pp. 448, 449, *infra*.)

(*j*.)—Under the Indian Act, alteration of the mode of enjoyment of any easement by an attempt to usurp a greater right than the dominant owner is entitled to, does not in any case *suspend* the original right till the dominant heritage is restored to its original condition. Such encroachment or excess of user may, under certain circumstances, *extinguish* the right altogether. (For the English law, see Gale, pp. 613 *et seq*, and Goddard, pp. 224, 360.)

Act, must be of some advantage to the dominant *heritage*, and not merely to the owner of an heritage with which the easement is wholly unconnected. It must be beneficial to the occupation or enjoyment of *the* land or tenement to which it is appurtenant. A man cannot make a right of way over land in Dacca *appurtenant* to an estate in Jessore. Such a right might be granted as a right *in gross*, but it would not pass with the occupation of the dominant heritage as appurtenant,[4] and is not an easement properly so called. It is assumed in several cases in England,[5] that a right to undisturbed privacy or prospect may be acquired by actual grant or covenant, and there is nothing in the Indian Act to prevent such acquisition. It must be remembered, however, that *all* possible easements are not capable of being acquired by *prescription* under the Indian or the English law.[6]

Indian statutory law before 1882 almost wholly silent on the subject of easements.

Before the enactment of Act V of 1882, Indian statutory law was silent on the subject of easements, except so far as regards certain disputes concerning them, their acquisition by prescription, the limitation of suits for disturbing them, the granting of injunctions

(*k.*)—Where reasonable notice of the discontinuance of an easement has not been given to the servient owner, he *is entitled* to compensation for damage caused to the servient heritage by such discontinuance. For the English law, see L. R., 6 Q. B., 578.

[4] Bailey *v.* Stevens, 31 L. J., C. P., 226; Goddard, pp. 14, 15.

[5] Tudor's Leading Cases, 203. Goddard, pp. 75, 79.

[6] For the restrictions under the Indian law, see sec. 17, Act V of 1882. For the English law as to prospect, see Attorney-General *v.* Doughty, 2 Ves. Sen., 453. See also Webb *v.* Bird, 13 C. B., N. S., 841 (free access for all the winds of heaven); Chasemone *v.* Richards, 7 H. L. C., 349 (percolating water); Bryant *v.* LeFevre, 4 C. P. D., 172 (free access of air to and from a chimney); Lord Rivers *v.* Adams, 3 Exch., 361 (right of an *indefinitely* large number of persons to a profit *a prendre*).

LECTURE XII. to prevent such disturbance, and their non-transferability *apart* from the dominant heritage. In most of the earlier Acts, even the term Easement is not used, but the rights denoted by the term are referred to by the expression "the right of use of any land or water" or "benefits to arise out of land."[7]

The Bill for the limitation of suits, drafted by the Indian Law Commissioners in 1842-3, and amended by Sir James Colvile in 1855—9, proposed two simple

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[7] Sec. 320 of Act XXV of 1861, Criminal Procedure Code, empowered the Magistrate to enquire into disputes concerning "the right of use of any land or water," and to pass certain orders on the subject. The corresponding section of Act X of 1872 (sec. 532) spoke of disputes concerning the right of use of any land or water, or *any right of way*. And now sec. 147 of Act X of 1882 refers to these disputes as disputes concerning "the right to do or prevent the doing of anything in or upon any tangible immoveable property."

The Registration Acts, XX of 1866, VIII of 1871, and III of 1877, define 'immoveable property' as including "rights to ways, lights, ferries, fisheries or any other *benefit to arise out of land*." (Ferries are neither easements nor profits *a prendre*, but they are incorporeal rights bearing some resemblance to easements and profits.)

The General Clauses Act (I of 1868) defines 'immoveable property' as including "benefits to arise out of land."

Sec. 7 of the Court-Fees' Act (VII of 1870) lays down, that in suits for "a right to some benefit to arise out of land" the amount of fee payable under the Act shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

Part III of the Specific Relief Act (I of 1877) lays down rules for the granting of an injunction where the defendant invades or threatens to invade the plaintiff's "right to, or the enjoyment of, property," and the illustrations to secs. 54 and 55 shew that an injunction may be granted to prevent the disturbance of easements.

Sec. 6 of the Transfer of Property Act (IV of 1882) enacts that "an *easement* cannot be transferred apart from the dominant heritage." The principle of the rule laid down in sec. 6 is, that an easement cannot be severed from the land to which it is annexed and made a right *in gross*. See Goddard, p. 10.

Sec. 40 of Act IV shews that an obligation imposing restriction on the use of immoveable property, or annexed to the ownership of such property, does not *necessarily* amount to an 'easement.'

rules for the acquisition and extinction by prescription of "rights to benefits, liberties or privileges derived out of the immoveable property of another person."[8] These rules were intended to apply to servitudes *appurtenant* as well as to servitudes *in gross*. But they were all omitted when the Bill was passed into law.[9] Rules for the *acquisition* of easements by positive *prescription* were first introduced by Act IX of 1871, and they were extended by Act XV of 1877 to the acquisition of profits *a prendre*.[10] For the territories respectively

[8] Secs. 4 and 5 of the amended Bill presented to the Council on the 8th of January 1859 ran as follows:—

"IV.—Subject to the exceptions and with the qualifications hereinafter mentioned, whoever has enjoyed, mediately or immediately, any benefit, liberty, or privilege, derived out of the immoveable property of another, or affecting such immoveable property or any right of ownership over the same, for the space of twelve years without interruption, shall acquire by prescription, both at law and in equity, a right to the enjoyment of such benefit, liberty or privilege as against the owner of such immoveable property, unless such benefit, liberty or privilege shall have been enjoyed by some consent or agreement expressly given or made for that purpose by some deed or writing."

"V.—If the perpetual right to any such benefit, liberty or privilege as in the last preceding section mentioned, whether acquired by prescription or otherwise, shall have been disused for twelve years when it was capable of being used, the same shall be extinguished."

[9] See p. 65, *supra*.

[10] See pp. 69 and 70, *supra*.

It may be here remarked that, under Act IX of 1871, in the absence of a definition of 'easement,' Sir Richard Garth, C. J., adopted Mr. Gale's definition of the term, and held, that the right to fish in a river or other water was not an easement. (Parbutty *v.* Mudho, I. L. R., 3 Calc., 276.) But under Act XV of 1877 it has been held by White, J., that by force of the interpretation-clause, sec. 3, the word 'easement' has a very much more extensive meaning than what it bears in the English law, and that it includes profits *a prendre* whether appurtenant or *in gross*. (Chundi *v.* Shib, 6 C. L. R., 269; S. C., I. L. R., 5 Calc., 269.) Looking to the definition of 'easement' in Act V of 1882, and the *total* repeal (of the provisions as to easements) of Act XV of 1877, so far as the Madras Presidency and two other provinces are concerned, it may be doubted if the Legislature *intended* that Act XV should apply to the acquisition of *any*

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The Indian Easements Act, 1882.

administered by the Governor of Madras in Council, and the Chief Commissioners of the Central Provinces and Coorg, Act V of 1882 provides rules for the *acquisition and extinction* of easements by prescription.[1] The Act also deals with the imposition and transfer of easements, and of the other means of acquiring and extinguishing easements. It further treats of the incidents of easements, their disturbance, suspension, and revival. Although the Act does not apply to the Presidencies of Bengal and Bombay and to several other provinces of British India, it is on the Indian statute-book, and will, as Sir Henry Maine thinks, serve as a magazine of rules to courts and lawyers *everywhere* in India.[2]

Easements have a *special* origin.

The *natural rights* of the owner of a plot of land, over the contiguous lands of others, are not held by a *distinct* title, but as incidents to the land itself.[3] They are given as of *common* right; it is not necessary either in pleading to allege, or in evidence to prove, any *special* origin for them; the burthen, both in pleading and in proof, is on those who *deny* their existence in the particular case.[4] Easements, so far as the dominant owner is concerned, are *enlargements*, and so far as the servient owner is con-

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rights *in gross*. Profits *in gross* are not governed by the English prescription Act, but this is owing to the language of the forms of pleading prescribed by that Act. See Gale, p 178. In the Indian Act, XV of 1877, there are no words to restrict its operation to profits *appurtenant*. But as to servitudes *in gross* not amounting to *profits*, that is, as to *easements* in the English-law sense of the term, it may still be held that Act XV does not apply to them.

[1] See secs. 15, 16, 17, and 47.

[2] See Mr. Stokes' speech in the Legislative Council, 16th February 1882.

[3] See Dalton *v.* Angus, 6 App. Cas., 740, 791.

[4] 6 App. Cas., at p. 809.

cerned, *restrictions*, either of *natural rights* or of the *ordinary* rights of property.[5] An easement, as distinguished from a natural right, has a *special* origin, and is held by a *distinct* title.

Modes of origination.

Omitting the exceptional cases of easements imposed by, or acquired under, an Act of the Legislature, or a decree of a Court of Justice, easements come into existence in one of the following modes or ways:—

I. By express grant or imposition. II. By implied grant, or imposition. III. In virtue of a local custom. IV. By estoppel. V. By prescription. VI. By the presumption of some lawful origin from the fact of long enjoyment.

I. Express grant.

I. Easements are sometimes constituted by an *express* grant[6] from the owner of one heritage (the servient) in favor of the owner of another (the dominant). Such grant may be either *inter vivos* or by testament.[7] The transfer of the dominant heritage passes an easement *already in existence*, unless a contrary intention appears.[8] Such an easement is apportioned if the dominant heritage is divided

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[5] The right of the riparian landowner in respect of a natural stream is natural; that of the millowner on the stream, so far as it *exceeds* that of an ordinary riparian proprietor, is an easement. The right to the vertical access of light and air is an ordinary right of property, but the *additional* right to the *lateral* access of light and air is an easement.

[6] The servient owner may expressly *impose* a servitude on his heritage by a *grant*. It is said that the *negative* easement of light is the subject, not of *grant*, but of *covenant*. But it is by no means impossible for the owner of the servient heritage to *grant* a right of unobstructed passage of light in a certain and defined course over such heritage to particular apertures in the dominant tenement. 6 App. Cas., 794. In English law, a grant of an easement must be made by *deed*. In British India, it is not even necessary that it should be *in writing*. See 4 Mad., 98.

[7] Innes' Digest, 3.

[8] Gale, p. 88; sec. 19. Act V of 1882.

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among several persons, provided the apportionment does not impose an additional burthen on the servient heritage.[9]

II. Implied grant or reservation.

II. Many easements are acquired by an *implied* grant or reservation arising out of an *express* grant of a tenement or heritage. Easements imposed in this way are either "easements of necessity," or *quasi*-easements arising from the disposition or arrangement of the owner of several heritages,—that is, from what the Code Civil calls *destination du père de famille.* The rights so implied out of an express grant become easements upon the *severance* of a heritage or the transfer of *one of several* heritages by the owner. Before the severance or the transfer, such rights have no legal existence as *easements.*[10]

The law presumes that when a person transfers a part of his property to another, it is the intention of the parties that the *transferee* should have the means of using the thing transferred, and therefore that he should have all rights and powers in or over the transferor's *other* property which might be *requisite* for his purpose. The same principle has been extended (notwithstanding Lord Westbury's disapproval of the extension) to the case of easements necessary to the *transferor* in respect of the property *retained* by him.[1]

Easements of necessity.

Easements over the grantor's other property, if they are necessary to render the tenement transferred

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[9] Gale, pp. 88 and 569. See also sec. 30, Act V of 1882.

[10] No man can have an easement or servitude in a thing of which he himself is the owner,—*Nulli res sua servit.*

[1] Gale, preface, ix; Statement of Objects and Reasons appended to the Indian Easements Bill.

capable of enjoyment, are easements of necessity. Similarly, easements over the transferred tenement, if they are necessary for enjoying the remaining property of the grantor, are also easements of necessity. These easements are presumed to have been impliedly *granted* or *reserved* by the grantor, for without such easements the enjoyment of the severed portions for the intended purposes cannot be had *at all*.[2] Some easements of necessity may exist as *quasi*-easements *before* the severance,—that is to say, as conveniences to which an owner finds it absolutely necessary to subject one part of his property for the benefit of another.

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*Quasi*-easements. Disposition of owner of two tenements.

Besides these, there may be other conveniences for which the owner makes one part of his property dependent on another. These conveniences, or *quasi*-

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[2] See Gale, pp. 96, 131; Goddard, pp. 26, 101, 217; sec. 13, Act V of 1882, Illustrations (*a*), (*b*), (*g*), (*i*), (*j*), (*k*), (*l*), (*m*), and (*n*).

The following are some instances of Easements of necessity:—

Instances of easements of necessity.

*A* sells *B* a field (then used for agricultural purposes only). It is inaccessible except by passing over *A's* adjoining land or by trespassing on the land of a stranger. By an implied *grant*, *B* is entitled to a right of way (for agricultural purposes only) over *A's* adjoining land to the field sold. In the same case, if the adjoining land retained by *A* is inaccessible except by passing over the field sold to *B*, *A* is entitled, by an implied *reservation*, to a right of way over *B's* field to the land retained.

*A*, the owner of a house, sells *B*, a factory built on adjoining land. By an implied grant *B* is entitled, as against *A*, to use the factory and pollute the air, when necessary, with smoke and vapours from the factory.

*A*, the owner of two adjoining buildings, sells one to *B*, retaining the other. *B* is entitled, by an implied grant, to a right to lateral support from *A's* building; and *A* is entitled, by an implied reservation, to a right to lateral support from *B's* building. The same principle applies to cases in which property is severed by a *partition* or by a compulsory acquisition under the Land Acquisition Act, 1870. It must not be supposed that whenever a man has not another way, he has a right to go over his neighbour's land. An easement of necessity is a thing founded on (an implied) grant or reservation. A landowner cannot create a way of necessity over his *neighbour's soil* by any act of his own. See Goddard, p. 218.

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easements, arise from the arrangements which the owner makes for the use of the several parts of his estate before they become the property of different owners.

*Quasi*-easements when impliedly granted or reserved.

"The appointment of the father of a family," says the Code Napoleon,[3] "is equivalent to a deed as regards continuous and apparent servitudes." According to the English law and the Indian Easements Act, *quasi*-easements, if apparent and continuous, and *necessary* for enjoying property *as it was enjoyed* when it was separated by grant, are, in the absence of a stipulation to the contrary, impliedly granted or reserved as easements on the severance of the property.[4] But *quasi*-easements,

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[3] Art. 692. *Before* the original heritage becomes the property of *different* owners by alienation or partition, the service which one part derives from the other is simple *destination du père de famille*. *After* the severance, the service becomes an easement. Gale, p. 97. The rule of law, as understood by the French legal title mentioned above, was applied to an Indian case by Glover and Mitter, JJ., in Amutool *v.* Jhoomuch, 24 W. R., 345. See also 22 W. R., 522; I. L. R, 2 Mad., 46.

[4] In Churun *v.* Docowri, 10 C. L. R., 577, Justice Field, referring to an *implied grant* of the use of a path and ghat over the plaintiff's land, says: "This implied grant might arise in one of two ways—(1) the use of the path and ghat might be absolutely necessary to the enjoyment of the defendant's tenement, in which case there would be an easement of necessity; (2) the use of the path and ghat, though not absolutely necessary to the enjoyment of defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance, and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with defendant's tenement." In the Easements *Bill*, easements of necessity were described as easements which were *absolutely necessary* for the enjoyment of the severed property, but in Act V of 1882, Easements of necessity are described as easements which are *necessary* for the enjoyment of the severed property. See sec. 13.

Instances of *quasi*-easements.

The following are instances of *quasi*-easements (arising out of the disposition of the father of the family or the owner of the heritages)

which are discontinuous or non-apparent, do not pass, unless the owner by *appropriate language* shows an intention that they should pass to the grantee of the *quasi*-dominant portion, or be reserved to himself notwithstanding the grant of the *quasi*-servient portion. As regards the *implied reservation* of *quasi*-easements, the Indian Act follows the decision in *Pyer* v. *Carter*, 1 H. and N., 916; and *Watts* v. *Kelson*, L. R., 6 Ch., 166, rather than Lord Westbury's decision in *Suffield* v. *Brown*, 33 L. J., Ch., 249.

It may be here observed, that there may be *quasi*-easements which are *first* used during the unity of ownership, as well as *quasi*-easements which were true easements *before* the unity of ownership, but which

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which become easements on the severance of the heritages, either by an implied grant or an implied reservation :—

*A* sells *B* a house with windows overlooking *A's* land, which *A* retains. The light which passes over *A's* land to the windows (though not absolutely necessary for enjoying the house) is necessary for enjoying the house *as it was enjoyed when the sale took place*. *B*, as the present owner of the *quasi*-dominant tenement, acquires, by an implied grant, an easement to the access of light over the land which *A* retains. The same principle applies in India, if *A* sells the land to a third person. If, again, the adjoining land is sold to *B*. and the house is retained by *A*, an easement of light is, by an implied reservation, acquired by *A* over the *quasi*-servient land now owned by *B*. (For the English Law on the subject, see Wheeldon *v.* Burrows, 12 Ch. Div., 264.)

*A*, the owner of two adjoining houses, *Y* and *Z*, sells *Y* to *B*, and retains *Z*. *B* is entitled, by an implied grant, to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Y as it was enjoyed* when the sale was made. Similarly *A* is entitled, by an implied reservation, to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Z* as it was enjoyed when the sale was made. See Illustrations (*c*), (*d*), (*e*), (*f*), and (*h*) of sec. 13, Act V of 1882.

Heritages severed by a *compulsory* sale in *execution* of a decree are also governed by the same principles. Hurree *v.* Hem, 22 W. R., 522.

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*became quasi*-easements by reason of the dominant and servient heritages becoming the property of the *same* person. Upon a severance taking place, such easements, properly speaking,[5] are not *revived*, but *newly created*. A grant or reservation is *presumed*, if they are, in their nature, continuous and apparent, and necessary for enjoying the severed portions as they were enjoyed before the severance. Where the alleged *quasi*-easement does not fulfil these conditions, or is not *absolutely* necessary for the enjoyment of the severed property, it does not pass to the grantee, or is not reserved to the grantor, by any *implication* of law. Certain *general words*, or *words* particularly describing the right, are necessary to pass or reserve such a *quasi*-easement.

Where *express* words are necessary.

Effect of the words "appurtenances" and "easements enjoyed therewith."

The general word "appurtenances," ordinarily inserted in deeds of conveyance, though sufficient to pass an existing *easement* over the property of a *third* person, is generally insufficient to pass or reserve a *quasi*-easement.[6] Mr. Goddard gives the result of the authorities on this subject, in England, in the following words: "If a man has two adjoining properties, and exercises a *quasi*-easement over the one for the beneficial enjoy-

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[5] See Gale, p. 89; Goddard, p. 357. But, according to the language of the Indian Easements Act, a "necessary easement" *revives* when the unity of ownership ceases from any cause whatsoever. Other easements *revive* if the grant by which the unity of ownership was produced is set aside by the decree of a competent Court: sec. 51, para. 2. Easements "of necessity" existing as *quasi*-easements during the unity of ownership, whether they are apparent and continuous *or not*, revive upon a severance, if the necessity continues.

[6] It would seem that the words *appurtenant* or *belonging* would, under certain circumstances, have a wider meaning. Chunder Coomar *v.* Kylas Chunder, I. L. R., 7 Calc., 665.

ment of the other, and sells the *quasi*-dominant tenement—if he sells it merely with the appurtenances, no easement is gained by the purchaser; if the *quasi*-easement existed as an easement before unity of ownership of the two properties, and the *quasi*-dominant tenement is sold 'with the easements used and enjoyed therewith,' the purchaser will become entitled to the easement; if the *quasi*-easement did not exist as an easement before unity of ownership, and the *quasi*-dominant tenement is sold 'with the easements used and enjoyed therewith,' the purchaser will get the easement if it is of a continuous character, as, for instance, a watercourse; but ordinarily he will not get it if it is only used from time to time, as a right of way. There are cases, however, in which the purchaser may get the easement, even though it is not continuous, for the general words in the deed of conveyance may be of such a character that the right will pass; but whether the right is gained must depend in each case upon the surrounding circumstances and the words used in the deed."[7] It may be further observed, that even in the case of a discontinuous *quasi*-easement, such as, a way which has been *first* used during the unity of ownership, and which never existed as an easement proper, the words "used and enjoyed therewith," or "therewith held or enjoyed," are large enough to carry or convey it, and to erect it into an easement proper in favor of the grantee; *provided* it has, in fact, been used for the convenience of the *tenement granted*, and not merely for the per-

[7] Goddard, p 99.

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sonal convenience of the *grantor* in the use of the property as a whole while in his hands.[8]

It is, at least, doubtful whether a description in the conveyance that the property is bounded on one side by a passage or lane, over the vendor's other lands, would of itself carry a right of way over the passage.[9] Such description, together with the conduct of the parties, may however *estop* the vendor from denying the right.[10]

III. Local custom.

III. An easement may also be acquired in virtue of a local custom. This has already been explained.[1] It is only necessary to add that, according to English law, a *profit a prendre* in *alieno solo* can *not* be claimed by custom.[2]

IV. Estoppel.

IV. An easement is sometimes acquired by estoppel,—as, for instance, if *A*, without title, professes to impose an easement in favor of *B*, *A* will be estopped from denying the right to such easement, if he subsequently acquires title to the servient heritage.[3]

V & VI. Prescription, and

V & VI. Easements are very often acquired by long and continued enjoyment,[4]—that is, either by

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[8] Chunder Coomar *v.* Koylash Chunder, I. L. R., 7 Calc., 665, and the English cases cited therein. See also I. L. R., 8 Calc., 677.

[9] I. L. R., 7 Calc., 665, 670. [10] Goddard, p. 88.

[1] See p. 361, *supra*, and sec. 18 of Act V of 1882. Under this Act, a profit may be acquired by custom. 'Easements' include 'profits.'

[2] See 7 App. Cas., p. 648. Copyholders in England are, however, allowed to claim a profit by custom. Tudor's Leading Cas., 137.

See on the subject of acquisition of profits by custom, I. L. R., 9 Calc., 698; and p. 362, note 7, *supra*.

[3] Goddard, p. 88. Act I of 1872 (The Indian Evidence Act), sec. 115. As regards the title to easements by the servient owner's *acquiescence* (and encouragement), see Gale, pp. 78—84. The doctrine of acquiescence is based on the rule of equitable estoppel, see pp. 77, 78, *supra*.

[4] The Code Napoleon, by art. 690, allows servitudes, *if continuous and apparent*, to be acquired (1) by title or deed, or (2) by possession for thirty

*prescription*, or by the *presumption* which refers such enjoyment to *some possible lawful origin* consistent with the circumstances of the case.[5]

presumption of lawful origin.

Prescription at Common Law.

According to the English Common Law, *long* continual enjoyment of an incorporeal right, when it has been enjoyed "*nec vi*" (peaceably, not contentiously or by force), "*nec clam*" (openly, not by stealth), "*nec precario*" (as of right, not at the will or pleasure of others), establishes the right prescriptively.[6] As to "long," Lord Coke says: "It is the time *given by law*, which in England is the time whereof there is no memory of man to the contrary." But though *living memory* might not be to the contrary, a claim by prescription was defeated, if written evidence shewed that the enjoyment had a *beginning*. Shortly after the enactment of the Statute of Westminster in 1275, the time of *legal memory* was fixed (by judiciary law) to be the same as the limitation of real actions by that Statute, *viz.*, the time of Richard I., A. D. 1189. This, when first introduced, gave a prescription of

years. By art. 691, the Code enacts, that continuous non-apparent servitudes, and discontinuous servitudes, whether apparent or not, can only, in future, be established by titles or deeds. No discontinuous, or non-apparent, servitude can be established, under the Code, even by immemorial possession or enjoyment. In this respect, the English law and the Indian law make no distinction between easements continuous and discontinuous, apparent and non-apparent. Some particular easements, however, are incapable of being acquired by long enjoyment, see p. 434, *infra*. In Scotland, *positive* servitudes alone are capable of being acquired by such enjoyment. 6 App. Cas., 740, 831.

[5] As to the presumption of a legal or lawful origin, see Rajroop Koer *v.* Abdool Hossein, 7 C. L. R., 529, 533, P. C.; (S. C.) I. L. R., 6 Calc., 394. See also Dalton *v.* Angus, 6 App. Cas., 740, 780, where Bowen, J., points out that, since the fusion of law and equity in England, it is better to speak of "the presumption of a *legal* origin" as "the presumption of a *lawful* origin." ("Lawful" includes both "legal" and "equitable.")

[6] See 6 App. Cas., 740, 796.

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about eighty-six years, but being a fixed date, it became longer and longer,[7] and now it is about 700 years. In the year 1623, the Statute 21 James I, c. 16, was passed, by which entry on lands was prohibited, except within twenty years after the accruer of the right, and, as a necessary corollary, an adverse enjoyment of lands for twenty years became a bar to any action of ejectment.[8] A little more than a century after this, the Judges introduced a new method of claiming incorporeal rights by means of a *fictitious* or imaginary modern grant, which, after twenty years' undisputed enjoyment, was presumed to have been made and subsequently lost. The fiction of a lost modern grant, or the presumption of some lawful origin,[9] based on the fact of twenty years' enjoyment, supplied the place of prescription, when length of possession was less than immemorial.[10] This modern doctrine, which is ancillary[1] to the doctrine of prescription at Common Law, and which is scarcely more than 125 years old, gives to twenty years' enjoyment the effect of prescription, though it is proved that the enjoyment began within living memory.[2] Before the introduction of this doctrine,

The fiction of a lost modern express grant.

[7] 6 App. Cas., 740, 810, 811. (Lord Blackburn's judgment.)

[8] 6 App. Cas., 781.

[9] It is presumed that the enjoyment originated lawfully, that is, according to the Common Law of England, by a grant.

[10] 6 App. Cas., 740, 796. [1] *Ibid*, p. 816.

[2] 6 App. Cas., 740, 810, 812; see also Bagram *v.* Khetter Nath, 3 B. L. R., O. C., 18, 22. This presumption is a presumption of *law*, which may be *rebutted* by such circumstances as the infancy or insanity of the servient owner, or the occupier of the *locus in quo* being only a lessee for a term or life. See Sir Barnes Peacock's judgment, 3 B. L. R., O. C., 18, 47. It is not a *præsumptio juris et de jure*—it is conclusive only when the evidence of enjoyment is uncontradicted and unexplained, that is, when it does not appear that the servient owner *could* not have granted the easement. 6 App. Cas., 740, 751 (the opinion of Pollock, B.) The pre-

the Judges had adopted, as a *quasi*-statutory standard, the period of twenty years as the time after which the *immemorial* enjoyment of an easement might be *presumed*. But such presumption was rebutted if the commencement of the enjoyment, or the extinguishment of the easement by unity of ownership or otherwise, at some period subsequent to the reign of Richard I, could be proved by the party contesting the right.[3] And it was this difficulty of establishing a title by prescription at Common Law which suggested the invention of the expedient of claiming easements by the fiction of a lost or non-existing grant.[4] The theory of an implied non-existing grant, as distinguished from a legal presumption of *some lawful origin*, is untenable and practically misleading in British India, and even in England since the fusion of law and equity.[5]

Statutory prescription in England.

In 1832, the 2 and 3 Will. IV, c. 71, an Act for shortening the time of prescription in certain cases, was passed. This Act, commonly called Lord Tenterden's Act,[6] or the Prescription Act, removed the difficulty in the way of establishing prescriptive titles, by providing that an easement enjoyed as of right for twenty years, or a profit *a prendre*, similarly enjoyed for thirty years, shall no longer be liable to be defeated or destroyed by showing only that it

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sumption must be acted upon, even if it appears that no grant was, *in fact*, made by the servient owner. 6 App. Cas., 740, 800, 814. Justice Markby was of opinion, that this presumption was a presumption of fact. 3 B. L. R., 18. Bowen, J., also is of the same opinion. 6 App. Cas., 782. As to what rebuts the presumption, see pp. 405-407, notes, *infra*.

[3] See Tudor's L. C. on Real Property, 180; Goddard, 116; I. L. R., 1 Mad., 387.

[4] Goddard. 117.

[5] 6 App. Cas., 765.

[6] The 9 Geo. IV, c. 14, relating to written acknowledgments, is *also* called Lord Tenterden's Act.

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was *first* enjoyed *within* time of legal memory.[7] The Act also rendered it *unnecessary* to force the consciences of juries to find that there had been a *lost grant*, when the presumption was known to be a mere fiction.[8] It made that a *direct* bar, which was before only a bar by the intervention of a jury and the use of an artificial fiction of law. But it did not *abolish* the doctrines of *presumption* which had been introduced before its enactment. If it had abolished those doctrines, old rights, even from time immemorial, would have been put an end to by unity of occupation for the space of a year. But this was not done.[9]

Difference between a twenty and a forty years' user.

The conditions which were generally necessary before the Statute are still necessary to the acqui-

[7] See 6 App. Cas., 800. See also the judgment of Martin, B., in Mounsey *v.* Ismay, 3 H. and C., 486. Goddard, 103.

[8] See 3 Q. B. D., 105 ; and 6 App. Cas., 799.

[9] See 6 App. Cas., 814 ; Goddard, 103, 104.

The rules for computing the periods of time prescribed by Lord Tenterden's Act provide that the claimant is not entitled to the benefit of the Act, if his enjoyment (in fact) of the right has been interrupted for a year, within the twenty years or other period prescribed by the Act, or if the enjoyment cannot be brought down to the commencement of the suit. Interruptions in the enjoyment are of three kinds :—(*a*) Interruptions in the enjoyment *as of right*; (*b*) Interruptions in the enjoyment *as an easement* or *as a servitude*; (*c*) Interruptions in the enjoyment *in fact*. Goddard, 104 and 154. Mere unity of occupation or possession occurring at *any* time during the twenty years or other prescribed period, is sufficient to prevent a claim from being established under the Act. The continuous enjoyment of the right *as of right* and *as an easement* is broken by the fact of the dominant and the servient tenements being in the occupation of one and the same person. But in a claim by prescription at the *Common Law*, an instance of unity of possession, without also unity of *ownership*, would not prevent its establishment. Gale, 153 (note); Modhusudan *v.* Bissonath, 15 B. L. R., 361. The right is supposed to have been acquired, by prescription at Common Law, *before* the unity of possession. Unity of ownership *extinguishes* a right which has been *already* acquired. Unity of possession only *prevents* the *acquisition* of the right, or *suspends* the right if it has been *acquired*.

sition of prescriptive rights by twenty years' user under the Statute. But it may be observed that, under the Statute, there is an important difference between a forty years' and a twenty years' user of an *easement*, and between a sixty years' and a thirty years' enjoyment of a profit *a prendre*. Forty years' user of an easement (other than light) has the same effect as twenty years' user has as to light; it makes the right *absolute and indefeasible*, unless it is shewn to have been enjoyed by consent or agreement in *writing*. But twenty years' user of an easement (other than light) may be defeated by any objection[10] to which a claim by prescription at Common Law was open, *except* that of shewing a commencement within time of legal memory.[1] (The same remark applies to sixty years' enjoyment of a profit *a prendre* as distinguished from a thirty years' enjoyment of the same.) Sections 27 and 28 of Act IX of 1871, secs. 26 and 27 of Act XV of 1877, and secs. 15 and 16 of Act V of 1882 have, for their prototype, the English statutory law of prescription relating to the

The English prototype of the Indian Law of Prescription.

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[10] As for instance, a previous license (written or *parol*) by the servient owner extending over the whole period; or the absence and *ignorance* of the servient owner and his agents during the whole period. Gale, 167 (note). Permission or license given from time to time *during the continuance* of the user, also makes the enjoyment *precarious* and, therefore, ineffectual. Goddard, 153. There can be no prescription if the servient owner has been *ignorant* of the user, or *incapable* of resisting the user, or of granting the right claimed. Goddard, 141, 144, 146. As regards ignorance, it has been laid down that knowledge may be *presumed* from the circumstances of the case. Goddard, 147; 6 App. Cas., 801. The servient owner must have had some *probable means of knowing* what was done against him, before a grant can be presumed against him. Daniel *v.* North, 11 East, 370, 372. As to license, see note 5, p. 407, *infra*.

[1] 6 App. Cas., 800; Gale 167, (note).

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acquisition of a right to *light* by twenty years' user, and of other easements by *forty* years' user. *Any* right acquired under these sections by twenty years' user, in British India, is absolute and indefeasible. It is matter *juris positivi*, and does not require the fiction or presumption of a grant to support it.[2]

Four ways of claiming easements by long enjoyment in England.

In England, there are thus four ways of claiming an easement by long enjoyment, *viz.*:—

(*a.*) By immemorial user from the commencement of the reign of Richard I. Such user may be presumed from proof of an enjoyment as far back as living witnesses could speak, or even from twenty years' enjoyment, unless rebutted by evidence shewing that the user actually commenced within time of legal memory. Proof of unity of possession without unity of ownership does not destroy the right.

(*b.*) By a modern lost grant, *presumed* to have been made from twenty years' user, where it is proved that the user commenced about the time when the grant is presumed to have been made.[3] Instead of presuming a lost grant, a right may be presumed without stating how it originated, except where a lost grant is *pleaded* and put in issue.[4]

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[2] See Ind. Gaz., 13th Nov. 1880, Part V, p. 477; Goddard, 125, 126; I. L. R., 10 Calc., 214, 217.

[3] Goddard, 104; 6 App. Cas., at p. 800.

[4] See the judgment of Sir Barnes Peacock in Bagram *v.* Kheter, 3 B. L. R., O. C., 18, 46. Ignorance of, or incapacity to resist, user rebuts the presumption of a grant. (Goddard, 105.) In cases of right presumed from modern user, it is necessary to see whether the servient owner was *capable of acquiescing* in the easement. If he is an infant, or a mere reversioner without possession, he is not capable of granting the easement or acquiescing in its acquisition. In Elliot *v.* Bhuvan, 19 W. R., 194, the Privy Council held, that uninterrupted user of at least twenty

The first and second modes are available, even when user has been interrupted for more than a year before suit.

(*c.*) By forty years' enjoyment *next before* the commencement of the suit.

In the computation of this period, the time during which the owner of the servient tenement was an infant or otherwise incapable of resisting the enjoyment, is not excluded as it is in the case of twenty years' enjoyment under the Act. A *parol* license given by the servient owner before the commencement of the user, and extending over the whole period, is not sufficient to defeat the right. Nor is the right defeasible by reason of the absence and ignorance of the owner during such period.[5] Unity of possession, even without unity of ownership, during any part of the period, prevents the acquisition of the right.

(*d.*) By twenty years' enjoyment next before the commencement of the suit.

In computing this period, the time during which the servient owner was incapable of resisting the

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years with the *acquiescence* of the owner of the servient tenement, was necessary to establish such a right. *Query*—If the authority of this case as to the necessity of *acquiescence* has not been shaken by the observations of some of the Lords in Dalton *v.* Angus, 6 App. Cas., 740, at least, so far as the right to *support* is concerned.

[5] See Gale, 167 (note) and 171 (note). A *written* license, given *before* the commencement of the enjoyment, prevents the acquisition of the right in *any* case. A license, *written or parol*, given at any time *within* the prescribed period, makes the enjoyment precarious, and prevents the acquisition of the right by forty years' enjoyment, and *a fortiori*, by twenty years' enjoyment. At the Common Law, license, written or parol, given before or during the enjoyment, prevents the acquisition of the right. In British India, no distinction is made between written and parol license. As to *previous* license, see expl. 1, sec. 15, Act V, 1882.

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enjoyment must be excluded. The right is defeasible in any way by which a claim by immemorial user is liable to be defeated, except the proof of a commencement within legal memory.

No easement can be acquired under the third and fourth modes unless the servient or dominant owner brings a suit in which the right is disputed, and the user is shewn to have continued up to (at least, within one year of) the commencement of the suit.[6]

It is frequently advisable to plead together in the same case all these four modes of claiming an easement, so that the evidence produced may support the claim in one or other of the several modes.[7]

The second recognized in British India.

As the English Prescription Act was never extended to British India, and as *immemorial* prescription, in the strict sense of that term according to English law, could not be availed of in a country which had come under British rule many centuries after the reign of Richard I, the only one of these four modes of acquiring easements by long enjoyment, which could be, or was practically, recognized in British India, was the second.[8] But the *quasi*-Parliamentary standard of *twenty years*' enjoyment could be adopted in the Presidency-towns only. In the mofussil, differ-

[6] Goddard, [illegible] 382. Interruption submitted to for *less* than one year not being an interruption within the meaning of the Prescription Act, the dominant owner may prove (constructive) an uninterrupted enjoyment up to the commencement of the suit, notwithstanding *such* interruption immediately before the suit.

[7] See Bullen and Leake's Precedents of Pleading, cited in Goddard on Easements, p. 104 (note).

[8] See Bagram *v.* Khetter, 3 B. L. R., O. C., 18; Elliot *v.* Bhuban, 19 W. R., 194, P. C.; and Rajrup Koer *v.* Abul Hossein, I. L. R., 6 Calc., 394; (S. C.) 7 C. L. R., 529, P. C.

ent standards, as stated in the third Lecture,[9] were adopted. But whatever the periods of enjoyment required might be, this mode of acquisition was based on the presumption which refers a long enjoyment to some lawful origin or title.[10]

Statutory prescription in British India.

From the first day of July 1871, a rule of statutory prescription for the acquisition of easements has been introduced in British India by Act IX of that year, and from the first day of October 1877 the same rule has been extended by Act XV of that year to the acquisition of profits *a prendre*. The present law on the subject, as regards the territories respectively administered by the Governor of Madras in Council, and the Chief Commissioners of the Central Provinces and Coorg, is contained in secs. 15—17 of Act V of 1882, and as regards the rest of British India, in secs. 26 and 27 of Act XV of 1877.

The law is remedial, and neither prohibitory nor exhaustive.

It has been held, that the object of Act IX of 1871, in enacting a rule for the acquisition of easements by possession or enjoyment, was to make more easy[1] the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised

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[9] See p. 69 (note), *supra*.

[10] See Mahomed *v.* Ali, 14 W. R., 124; I. L. R., 6 Calc., 404, P. C.; 6 App. Cas., 801, 812.

[1] *Per* Sir M. E. Smith, in Rajrup Koer's case (I. L. R., 6 Calc., p. 403). But as regards the *period* of enjoyment required, the establishment of these rights was easier, under the judiciary law in vogue in the Presidencies of Bengal and Madras. See p. 69 (note), *supra*. In the Presidency of Bombay, as well as in the other Presidencies, it was also not necessary to prove enjoyment *ending within two years* of the suit. Act IX and the subsequent Acts, however, make the acquisition easier in so far as they confer the right even in cases of ignorance or incapacity of the servient owner.

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under the conditions prescribed by the Act, to give, without more, a title to easements. The Act was remedial, and was neither prohibitory nor exhaustive. The same remark applies to the corresponding rule of Act XV of 1877. A man may acquire a title under it who has no right at all, but it does not exclude or interfere with other titles and modes of acquiring easements.[2]

The Indian Acts not having made any distinction between a twenty years' user and a forty years' user, we have *one* mode of acquiring easements by *statutory* prescription.

Presumption of a lawful origin.

As has been already observed, the only *other* mode of acquiring such rights by long enjoyment in this country, is that which rests on the presumption of a lawful origin. The length of the period of enjoyment necessary to give rise to such a presumption is left *indefinite* by the decisions on the subject. It is sometimes said, that the possession or user must be immemorial, so that *the origin of it is unknown.*[3] It is also said, that the claim may be based on immemorial user, and the right

Duration of enjoyment required.

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[2] I. L. R., 6 Calc., 394, 403. P. C. See also Modhoosoodun *v.* Bissonath, 15 B. L. R., 361; Charu *v.* Docowry, I. L. R., 8 Calc., 956.

[3] "Long and undisturbed user or possession, *when the origin of it is unknown*, confers a title, because no other inference can be drawn than that the possession is, in some way or other, founded on title, although it is not known whence or how the title was obtained." Gooroo Pershad *v.* Bykunto, 6 W. R., 82, 83.

"*Immemorial user* must be referred to a legal origin, that is, either to a lost grant or to an agreement between the predecessors in title of the parties." Punja *v.* Bai Kuvar, I. L. R., 6 Bomb., 20, 23.

In England, proof of an enjoyment as far back as *living witnesses* could speak, would raise the *presumption* of an enjoyment from the time of Richard 1st. Jenkins *v.* Harvey, 1 Cr. M. & R., 894; Tudor, 180. Even twenty years' user may raise such a presumption—Goddard, 116.

*presumed* after a twenty-five or thirty years' enjoyment, unless anything is shewn to the contrary.[4] Where the enjoyment had lasted "possibly fifty or sixty years—certainly more than twenty years," their Lordships of the Privy Council referred such enjoyment to a legal origin, although the enjoyment having been interrupted for more than two years before the institution of the suit, was not sufficient to establish a title under the rule of statutory prescription.[5] In one case, in which the claimant alleged a fifty or sixty years' user, the Calcutta High Court, without determining the length of time necessary to give rise to the *presumption* of a grant or other legal origin, directed the lower Court to find, if there was evidence of enjoyment of *such a character and duration* as would justify the presumption.[6]

Quality of enjoyment required.

Before Act IX of 1871 came into operation, it was held by the Calcutta High Court, specially in the case of affirmative easements, that the enjoyment must be *uninterrupted*;[7] *adverse*,[8] that is, not permissive, but *as of right*;[9] and *open*.[10] In the case of

[4] Koylas *v.* Sonatun, I. L. R., 7 Calc., 132, 136.

[5] Rajrup *v.* Abul, I. L. R., 6 Calc., 394, P. C.

[6] Achul *v.* Rajun, I. L. R., 6 Calc., 812.

[7] Joyprokash *v.* Ameer Ally, 9 W. R., 91; Askar *v.* Rammanick, 13 W. R., 344; Futteh Ali *v.* Asgar Ali, 17 W. R., 11. Where the user is from time to time interrupted by the owner resuming, as occasion may require, the exclusive use of his land, the user will be treated as permissive only, and not as the exercise of a right. Aukhoy *v.* Mollah, 13 W. R., 449.

[8] Joyprokash *v.* Ameer Ally, 9 W. R., 91.

[9] Askar *v.* Rammanick, 13 W. R., 344. Enjoyment at the mere will and favor of the owner of the land is not enjoyment *as of right*. Futteh Ali *v.* Asgar Ali, 17 W. R., 11.

[10] Mahomed *v.* Joogul, 14 W. R., 124. In the *other* cases referred to in notes 7, 8 and 9, nothing is said about the user being *open*. But *as of right*, in English law, means peaceable, open, and not permissive.

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"light" it was held, on the Original Side of the High Court, that the enjoyment must be *uninterrupted*, and *acquiesced in* by the owner of the servient tenement, or by his agent.[1] As observed by Bowen, J., in *Dalton* v. *Angus*,[2] the cantilena *nec clam, nec vi, nec precario*, is a doctrine which is applicable to every case in which inchoate user is matured by length of time (apart from Statute) into the presumption of a right acquired at a neighbour's expense. The presumption arising from such user for twenty years is rebutted by proof of the *incapacity* of the servient owner to *acquiesce* in, or resist the user. In India, as in England, the effect of any *disability* on the part of such owner, as well as of any *restrictions* arising from the state of the title, must, of course, be taken into consideration.[3]

Enjoyment need not continue till within two years of suit.

As to the *duration* of the enjoyment required in the mofussil of Bengal and Madras, before July 1871, there was a diversity of opinion.[4] But the weight of authority was in favor of the position that a grant of an easement might be presumed from a twelve years' user.[5] A right acquired by enjoyment existed until it was expressly or impliedly abandoned or otherwise

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[1] Bagram *v.* Khetturnath, 3 B. L. R., O. C., 18; Elliot *v.* Bhoobun, 19 W. R., 194, P. C.

[2] 6 App. Cas., 785. See also Lord Selborne's judgment, p. 786, and Lord Blackburn's judgment, p. 819. See Benest *v.* Pipon, 1 Knapp, P. C. C., 70.

[3] See 3 B. L. R., O. C., 18, 47; I. L. R., 10 Calc., 214, 218; 6 App. Cas., 740, 751, 827.

[4] Rajah Bijoy *v.* Obhoy, 16 W. R., 198.

[5] Kurupam *v.* Meranji, I. L. R., 5 Mad., 253, 255. See also p. 69 (note), *supra*. The *quasi*-parliamentary period of twenty years was adopted in the Presidency-towns.

extinguished.[6] It was held in one case that a right of way was lost by non-user for six years,[7] but non-user was, in general, regarded as evidence from which a release or abandonment might be implied.[8]

Otherwise under the statutory rule.

Since the 1st of July 1871, the period of enjoyment required by the rule of statutory prescription is *twenty* years, *ending within two years* of the suit in which the right to the easement is contested, so that, if the enjoyment ceased *more* than two years before the institution of such suit, the right cannot be held to have been acquired.

25 or 30 years' enjoyment, whether ending within 2 years of suit or not, will raise the *presumption.*

As the law expressly requires an enjoyment of twenty years for the acquisition of easements, by prescription proper, the *presumption* of a lawful title from long enjoyment, it is apprehended, cannot now arise, unless the enjoyment has lasted for, at least, twenty years.[9] Possibly, as suggested by Sir Richard Garth, C. J., in *Koylas* v. *Sonatun*,[10] twenty-five or thirty years' enjoyment would be sufficient for the purpose, if there are no circumstances to rebut the presumption of

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Khetter Nath *v.* Prossuno, 7 W. R., 498. See also Juggut *v.* Juggut, 12 W. R., 519.

Hurreedoss *v.* Jodoonath, 5 B. L. R., App., 66. But non-user for seven years had no such effect in the Madras case cited above.

[8] Kena *v.* Bohatoo, Marshall, 506; Juggut *v.* Juggut, 12 W. R., 519. See also Brown, p. 229; and Ward *v.* Ward, 7 Exch., 838, in which a right, where there was no occasion to exercise it, was (in England) held to survive a non-user for more than twenty years.

[9] But a person who had acquired an easement by an enjoyment for *twelve* years and upwards, *before* Act IX of 1871 came into operation, is not prevented by that Act or Act XV of 1877 from suing to establish his right, although such enjoyment has ceased for more than two years before the suit. Kurupam *v.* Meranji, I. L. R., 5 Mad., 253, 255. Enjoyment for a period *shorter* than twenty years coupled with *other circumstances*, may still lead to an inference of an actual grant. See Goddard, 132.

[10] I. L. R., 7 Calc., 132, 136.

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a lawful origin or title. A title thus proved may be relied on, specially in cases where the claimant cannot show that his enjoyment continued within two years of the suit in which his right is disputed. And even if it be shown that the enjoyment of the easement commenced within time of living memory,—as for instance, that it did not exist thirty or forty years before, but originated about twenty-five years ago,—the presumption of a lawful title from such long enjoyment will not be rebutted.[1]

The present statutory rule of prescription.

Act XV of 1877 and Act V of 1882 enact[2] the general rule, that where any easement has been *peaceably* and *openly* enjoyed by any person claiming title thereto, *as an easement*, and *as of right*, *without interruption*, and for *twenty* years, the right to the easement shall be absolute and indefeasible. The period of twenty years shall be taken to be a period *ending within two years* next before the institution of the *suit* wherein the claim to which such period relates is contested. Provided[3] that when the servient herit-

[1] Joy Prokash *v.* Ameer Ally, 9 W. R., 91. In this case the suit was commenced in 1866, and the easement was shown to have been non-existent in 1841. In Rajrup Koer's case (I. L. R., 6 Calc., 394, P. C.), also the watercourse was constructed within time of living memory.

Using the term 'prescription' for 'immemorial prescription,' Sir Barnes Peacock, C. J., said—"Prescription in England is not the same as prescription in the mofussil" (9 W. R., 91). Using the term, for 'prescription by the fiction of a lost grant' or 'prescription by the presumption of a lawful origin,' Sir Richard Garth says: "Easements may still be claimed in this country by prescription, and when they are so claimed, the principles which apply to their acquisition in England will be equally applicable in this country. But those principles do not necessarily apply to the acquisition of easements under the Limitation Act." (I. L. R., 10 Calc., 214, 218.)

[2] See sec. 26, Act XV of 1877; and sec. 15, Act V of 1882. See p. 438, *infra*.

[3] Sec. 27, Act XV of 1877; and sec. 16, Act V of 1882.

age has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement, during the continuance of such interest or term, shall be excluded in the computation of the said period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the reversioner or the remainderman.[4]

A fluctuating body of persons cannot claim under the rule.

The word "person," according to the General Clauses Act, includes a body of individuals, whether incorporated or not. But it has been held that an unincorporated and *fluctuating* body of persons like "the tenants of certain pergunnahs" cannot derive any benefit from this rule of prescription. It must be shown that the *same* determinate person or persons claiming title to the easement have enjoyed the right for the required length of time. This cannot be done in the case of a *variable* body.[5] And as an unincorporated fluctuating body cannot be the *owner* of a (dominant) heritage, such a body cannot claim an easement under Act V of 1882.

Enjoyment must be peaceable.

It is necessary that the enjoyment of the easement should be *peaceable* or without opposition. Enjoyment by force or violence, enjoyment during strife

[4] In England, it is only the *reversioner* who is entitled to this exclusion in the computation of the prescriptive period. See Laird *v.* Briggs, 19 Ch. D., 22. The Indian law is in accordance with the view taken by Fry, J., in the original hearing. The words of the Indian law give the benefit of the proviso to "the person entitled on such determination, to the said land."

[5] See Luchmeeput *v.* Sadaullah, I. L. R., 9 Calc., 698, 703. Such variable bodies can claim an easement by *custom* only. Goddard, 145. In England, a profit *a prendre in alieno solo* cannot be claimed by such a body even by custom: Rivers *v.* Adams, 3 Ex. D., 361.

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or contention of any kind, enjoyment continually disputed and interrupted (even where such interruption is *not* acquiesced in for one year) is not *nec vi*, or peaceable.[6] Repeated interruptions *in fact*, though each too short to operate as "an interruption" within the meaning of the Acts, are good evidence to show that the user all through was "contentious."

Enjoyment must be open, except in the case of light, air, and support.

The enjoyment must be *open* and manifest, not clandestine, furtive or invisible. If the enjoyment is had secretly or by stealth, if it is had surreptitiously in order to keep the fact of enjoyment from the knowledge of the servient owner, it is not *nec clam*, or open.[7] But so long as the enjoyment is not secret, it is not necessary that the servient owner should have *actual knowledge* of the user; his ignorance of the claimant's enjoyment does not prevent the latter from acquiring the right under either of the two Acts.[8] It may be mentioned here, that, under Act XV of 1877, it is not necessary to prove publicity or openness of enjoyment in the case of the acquisition of a right to the access or

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[6] Goddard, 153, 154; Eaton *v.* Swansea Waterworks Company; Gale, p. 176. As the Indian law *expressly* requires peaceable enjoyment, it is hardly possible to contend that "the law *operates* if the enjoyment has *once* been as of right, and *afterwards* becomes contentious, provided there is no *interruption* within the meaning of the law."

[7] See 6 App. Cas., 801, 802; I. L. R., 6 Bomb., 522.

[8] It was the same under Act IX of 1871. The fact that the servient owner is *ignorant* of the user or has been *incapable* of resisting it, by reason of minority, insanity, or want of a *present* right to possession (except where sec. 27 of Act XV or sec. 16 of Act V applies), is no bar to the acquisition of the right. See Ind. Gaz., 13th Nov. 1880, Part V, p. 477; Arzan *v.* Rakhal, I. L. R., 10 Calc., 214.

use of *light or air*;[9] and that, under Act V of 1882, the right to *light*, *air* or *support* may be acquired even if the enjoyment has not been *open*, or *as of right*.

Enjoyment *as an easement* necessary.

The claimant must have enjoyed the right *as an easement*. If there had been unity of possession and ownership during the whole or any part of the required period, he would not have enjoyed an *easement*, but the *soil* itself.[10] Mere unity of possession also, at any time during the twenty years, is fatal to a claim under the Acts.[1] A tenant of land cannot acquire an easement by prescription over other lands in *his occupation*, though such lands are held under a different landlord. And the owner of a house being tenant and occupier of the adjoining land cannot acquire an easement over such land.[2]

Unity of title and unity of possession.

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[9] It was the same under Act IX of 1871. In the case of window-light, the condition of publicity is almost necessarily fulfilled, see 6 App. Cas., 787. If the enjoyment of the light and air *is open*, and had in such wise as not to involve the admission of an obstructive right in the owner of the alleged servient heritage, it is an enjoyment "as of right." Mathuradas *v.* Bai Amthi, I. L. R., 7 Bomb., 522.

In the case of light and air under Act XV of 1877, and in the case of support, as well as light and air, under Act V of 1882, it is not necessary that the dominant building should be *occupied* by any person. It is sufficient if the light or air or support has been received by the *building*. See Gale, 172; Pranjivandas *v.* Myaram, 1 Bomb., 148.

[10] Goddard, 151, 154, 157. "Whilst unity of possession (and ownership) lasted, no question of easement could arise." J. Anderson *v.* Juggodomba, 6 C. L. R., 282, 284.

Unity of title or ownership, even without unity of possession, extinguishes easements. Goddard, 367; sec. 46, Act V. If the dominant owner purchases the servient heritage *jointly* with *another*, there is no *unity* of title, and the easement is not extinguished; but unity of possession renders the enjoyment *not* "as of right." Modhoosoodun *v.* Bissonath, 15 B. L. R., 361. See note 9, p. 404, *supra*.

[1] See Gale, 168; Modhoosoodun *v.* Bissonath, 15 B. L. R., 361.

[2] Harbidge *v.* Warwick, 3 Exch., 552; Goddard, 154; Gale, 173.

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But where a *trustee* of one heritage is the *beneficial owner* of another, and both heritages are in his possession, an easement over the latter may be acquired for the beneficial enjoyment of the former. Thus, though the freehold of the church and the glebe are both vested in the rector, the church may acquire easements over the glebe.[3]

Under the Acts, the operation of the unity is not merely to suspend the process of acquisition while it lasts, but to destroy altogether the effect of the previous user by breaking the continuity of the enjoyment as an easement and as of right. In computing the period of twenty years, it is not allowable to exclude the time during which the unity continued, and to tack the period of subsequent enjoyment to that of the previous user.[4] Exclusion in the computation of the period is allowed *only* in the case of the servient owner being not entitled to present possession during a part of the period of enjoyment.[5] The English Statute and the Indian Acts, generally speaking, contemplate a *continuous* (though not incessant) enjoyment for twenty years.[6]

Enjoyment must be *as of right.*

Another quality of the requisite enjoyment is that it must be "as of right." Lord Denman, C. J., held, that enjoyment *as of right* in the English Statute meant an enjoyment had openly and notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a

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[3] Eccl. Commissioners *v.* Kino, 14 Ch. D., 213.

[4] Onley *v.* Gardiner, Gale, 215, 216. It is otherwise in England in the case of a right to *light.* Ladyman *v.* Grave, Gale, 172.

[5] See sec. 27, Act XV of 1877; and sec. 16, Act V of 1882.

[6] See Goddard, 155; Tudor's Leading Cases, 3rd Ed., p. 188.

trespasser, as a matter of right, whether strictly legal or not, yet lawful to the extent of excusing a trespass.[7] In the words of Erle, J., "if the enjoyment has been clandestine, contentious, or by sufferance, it is not of right."[8] It is evident that, in the Indian Acts on the subject, the expression "as of right" has a *less* extensive meaning, for the Legislature here expressly requires that the enjoyment must be "as of right," *as well as* "open" and "peaceable."

In *Alimoodeen* v. *Wuzeer Ali*,[9] Justice Markby, after referring to the difficulties which arose upon the interpretation of this expression in the English Statute, held, that here it signifies no more than that the enjoyment must be by a person *in the assertion of a right.* It is not necessary that the claimant should have enjoyed the easement "rightfully" or "without trespass."[10] If he *claims a title* to the easement, and the easement is *not* enjoyed *under a license or permission* from the owner of the servient heritage, his enjoyment is "as of right," or *nec precario.*[1] A person who, during the requisite period of enjoyment, *asks the permission* of the servient owner, does not assert a right to the easement. By asking for permission, he admits that he then has no right. Each renewal of the license rebuts the presumption that the enjoyment is had under a *claim of title* to the easement.[2]

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[7] Tickle *v.* Brown, 4 A. & E., 369; Goddard, 152. The easement must have been enjoyed in the manner that a person rightfully entitled would have used it, and not as a trespasser would have done. And the claimant must not have occasionally *asked the permission* of the servient owner. See the judgment of Parke, B., in Bright *v.* Walker, 1 Crompton, Meeson and Roscoe's Reports, 211, 219.

[8] 17 Q. B., 275; Gale, 209.

[9] 23 W. R., 52.

[10] Markby's Elements of Law, para. 402.

[1] Gale, 213.

[2] Gale, 168, 171, 213; Goddard, 153. See note 5, p. 407, *supra.*

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In the case of a negative easement (*e. g.*, of light or air), the inchoate enjoyment of the right is, in the eye of the law, no injury or wrong to the owner of the adjacent heritage who is at liberty to obstruct the enjoyment by some act done on his own heritage.[3] If the open enjoyment of such an easement is not actually obstructed, and it is "not had in such wise as to involve the admission of an obstructive right" in the owner of the adjacent heritage, the easement is enjoyed "as of right" within the meaning of Act XV of 1877.[4] Enjoyment which no one has a right to obstruct, as the enjoyment of an easement over land in the possession of the claimant himself, is not adverse enjoyment, or enjoyment as of right.[5] Such enjoyment may be open to the further objection that it is not an enjoyment *as an easement.* Enjoyment which has been had *adversely* to the owner of the servient heritage, "as the exercise of a *right*," and not at the mere will and favor of such owner, is enjoyment *as of right.*[6] A tradesman, or a friend, who daily

[3] When the owner of a dwelling-house opens new windows, he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of building on his land. *Per* Lord Westbury in Tapling *v.* Jones, 11 H. L. C., 290. See Goddard, p. 308.

[4] Mathuradas *v.* Bai Amthi, I. L. R., 6 Bomb., 522.

[5] Modhoosoodun *v.* Bissonath, 15 B. L. R., 361.

[6] Askar *v.* Rammanick, 13 W. R., 344; Aukhoy *v.* Mollah Nobbee, 13 W. R., 449; Futteh Ali *v.* Asgur Ali, 17 W. R., 11.

"Adverse possession" should, however, be distinguished from possession (or user or enjoyment) "as of right." Chundi *v.* Shib, 6 C. L. R., 272. In the case of positive easements, possession or user as of right is partially analogous to adverse possession. The owner has a right of action for the adverse possession of the land or the adverse user of an easement over the land, but "user as of right" does not, as "adverse possession" does, oust the owner from his *occupation* of the

opens my gate and walks up to my door, under a tacit *permission*, which may be revoked at any moment, is not at all in *quasi*-possession or enjoyment of an easement. The grantee of a way for the term of twenty years may be in *quasi*-possession of it, but his enjoyment is derivative like that of a lessee for a term of years, and he cannot acquire an absolute and indefeasible right by prescription against his grantor.[7] If the servient owner or occupier has agreed to allow the user or enjoyment for an unlimited period and as an indefeasible easement, the enjoyment, though in one sense derivative, is valid

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land. In the case of the negative easement of light or air, the enjoyment is had *without trespass* on the neighbour's land, and the enjoyment is presumably as of right, if it is submitted to, or not obstructed by the neighbour. The difficulty of proving that the enjoyment of a negative easement has been an enjoyment *as of right*, is referred to in Markby's Elements of Law, secs. 378 and 379; and also in Bagram *v.* Khetternath, 3 B. L. R., O. C., 18; and Bhoobun *v.* Elliot, 6 B. L. R., 85. See the judgments of Justice Markby. Justice Markby, following Savigny, held, that the enjoyment of a negative easement was not enjoyment *as of right*, unless it appeared that there was *patientia* or submission on the part of the servient owner. But his opinion as to the necessity of shewing *patientia* on the part of the servient owner in the case of negative easements, does not appear to have been adopted or acted upon by other Judges. Actual uninterrupted enjoyment, unless affected by express agreement, has been considered to be practically sufficient for the purpose of raising the presumption of right. Proof of such enjoyment for twenty years is, in all cases, *primâ facie* evidence of a title which must be rebutted by the servient owner. The presumption is, that a party enjoying an easement acted under a claim of right until the contrary is shown: Gale, 201, 208; Campbell *v.* Wilson, 3 East, 294. Under Act V of 1882 it is not necessary, in the case of light, air or support, that the enjoyment should be *as of right*. "As a rule, it is not possible to prove, in the case of such easements, that the enjoyment is *as of right* in the sense in which these words are now understood." See Mr. Stokes' Speech in the Legislative Council, 16th February, 1882.

[7] Markby, secs. 377, 401. See also Hureedoss *v.* Jodoonath, 14 W. R., 79 (as to the presumption of the enjoyment being under a *license* when the two owners are near relatives), and expl. 1, sec. 15, Act V of 1882.

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*quasi*-possession. But enjoyment under a mere revocable license, or a permission granted for a limited period, or subject to a condition on the fulfilment of which it is to cease, is not such enjoyment as would ripen into an absolute and indefeasible right under sec. 15 of the Easements Act, or under sec. 26 of Act XV of 1877.[8]

Enjoyment *by* whom?

Enjoyment by any one in possession of the dominant heritage, whether as owner, tenant, or servant (and notwithstanding any personal disability of the possessor), may give the owner a prescriptive right. Enjoyment had by such possessor under a claim of right in respect of such heritage, is sufficient.[9]

What constitutes enjoyment?

The physical possibility of exercising or enjoying an easement, coupled with the determination to exercise and enjoy it on one's own behalf, constitutes *quasi*-possession or enjoyment.[10] Where an easement has once been enjoyed as of right, such enjoyment continues, if the physical possibility of enjoyment and the mental determination to enjoy are not wanting. To prove continuous *quasi*-possession, it is not necessary to prove continuous *actual* user, any more than it is necessary to prove continuous *bodily* contact in order to prove possession of a corporeal thing.[1] The enjoyment *continues* so long as the

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[8] See expl. 1, sec. 15, Act V of 1882. This explanation, it is apprehended, is declaratory of the law as it stood before the passing of Act V of 1882.

[9] See Gale, 206; Tudor, 182; and sec. 12, Act V of 1882.

Enjoyment, by the owner of a house, "in the persons of his servants and the members of his family," may be sufficient. *Per* Phear, J., I. L. R., 1 Calc., 422, 425.

[10] Markby, sec. 377. See p. 421, *supra*.

[1] See Markby, sec. 377; p. 134, *supra*; Tudor's Leading Cases, p. 190; and Flight *v.* Thomas, 11 Ad. & Ell., 688.

claimant's right is not interfered with whenever he has occasion to use it.[2] (But see p. 445, *infra.*)

An easement must be *actually* enjoyed for the *full* period prescribed, before a prescriptive right to it may be acquired under the English Statute. The Indian law omits the words "actually" and "full" from its rule for the acquisition of easements by prescription. It is true that illus. (*b*) of sec. 26, Act XV of 1877, seems to make "enjoyment" equivalent to "actual user;" but it has been held that the Illustration cannot be allowed to control the ordinary sense of the word "enjoyment," which occurs in the section itself, and the Legislature appears to have adopted this interpretation in Act V of 1882.[3]

Proof of continuous enjoyment *for* the prescribed period.

Evidence of user, a little *before*, and again *after*, the prescriptive period had *begun*, may be ground for presuming user and enjoyment at the commencement of the prescriptive period.[4] How many times the right has been exercised during any part of the period is not material if the claimant exercised it as often as he chose.[5] The enjoyment of the right may continue to the *end* of the prescriptive period,—that is, till within two years before suit, although there has been no *actual* user or exercise of

[2] Koylas *v.* Puddo, 8 C. L. R., 281, 284; (S. C.), I. L. R., 7 Calc., 132.

[3] The objectionable Illustration does not appear under sec. 15 of Act V of 1882, which corresponds to sec. 26, Act XV of 1877. See 8 C. L. R., 281. Even in England, it has been held in some cases, that *actual* user for the *full* period is *not* necessary. Flight *v.* Thomas, Carr *v.* Foster, Lawson *v.* Langley, cited in Goddard on Easements, pp. 124, 130, 132.

[4] Lawson *v.* Langley, 4 A. and E., 890; Carr *v.* Foster, 3 Q. B., 581; and Goddard, 131, 132. It appears from these cases that there is authority for this proposition even in England.

[5] Carr *v.* Foster, 3 Q. B., 581, 587; Tudor's Leading Cases, p. 190.

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the right at the *end* of the period.[6] Some discontinuous easements, by their very nature, necessitate *long* intervals between the acts of actual user.[7] A's right of passage for boats over B's land when it becomes covered with water during the rainy season, can only be exercised during two or three months of the year, and if there be a lack of rain, it is probable that, even for twenty or twenty-one months, the right may not be exercised at all.[8] Again, as ponds are not cleared every year, there must be long intervals between the acts of exercising an easement, of putting the soil of one's pond on another's land when the pond is cleared.[7] So the right of carrying marriage and funeral processions over a neighbour's land cannot be exercised every year, unless marriages and deaths in the family of the claimant take place every year. It may, however, be doubted if a right which is capable of being exercised only once in ten or fifteen years, may be acquired by twenty years' enjoyment under the statutory rule.[9]

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[6] Koylas *v.* Puddo, 8 C. L. R., 281, 283. In England, the weight of authority is in favor of the proposition that there must be *actual*, *i. e.*, real, physical, positive enjoyment, in the first and the last year of the twenty years. See Hollins *v.* Verney, 11 Q. B. D., 715, 718.

[7] See Phear on Rights of Water, 97.

It may be here observed, that, in the opinion of Parke, B. (recently approved of by Lord Coleridge, C. J.), the English *Statute* cannot apply where the rights are used at intervals of two or three years, for in such cases a party could not acquiesce in an interruption *for one year*. (See Hollins *v.* Verney, 11 Q. B. D., 715, 718.) The words "*actual* enjoyment for the *full* period of twenty years" in the Statute, the form of plea under the Statute, and the explanation of "interruption" of enjoyment, induced Parke, B., to incline to the opinion that there must be actual user, at least once every year. The last only of the three reasons may apply to the Indian law on the subject. See Goddard, 130.

[8] 8 C. L. R., 281, 284.

[9] See Hollins *v.* Verney, 11 Q. B. D., 715.

What is or is not an interruption.

A cessation of user occasioned by the *accident* of a dry season or other causes over which the claimant has no control, is not an interruption of the enjoyment.[10] A cessation of user of an easement of grazing one's cattle on another's heritage, caused by the dominant owner not having any cattle for two or three years, is also not an interruption of the enjoyment of the right.[1]

Similarly, suspension of user, by contract between the dominant and servient owners, as for instance, the temporary substitution by agreement of another way for that to which the right is claimed, is not an interruption.[2]

Mere non-user, for a time, of an easement, which the claimant might, if he pleased, enjoy during that time, but which, for some good reason, he does not care to enjoy, is not an interruption of the enjoyment.[3] There must be an *adverse* obstruction *sub-*

[10] Hall *v.* Swift, 4 Bing. N. C., 381; Goddard, 158.

"In estimating the duration of user, it often is no easy matter to say, whether the acts have been such as, upon the whole, to constitute continuous user; whether, in fact, the absence of acts at any time probably arises from an interruption of the right, or merely from an interruption of the user, the right still existing. This must always be a question for the jury, and would depend upon whether the user were sufficiently frequent under the circumstances to be a natural exercise of the right claimed or seemed to have been rendered incomplete by some external interference." Phear, 97.

[1] Carr *v.* Foster, 3 Q. B., 581; Goddard, 131; Sham *v.* Tariny, I. L. R., 1 Calc., 422, 430. The owner of a house ceasing to use a way to it, because the house is for a time unoccupied, is another instance. But, under sec. 47 of Act V of 1882, the circumstance that the easement *could not be enjoyed* does not convert actual non-enjoyment (of a right *already* acquired) into a constructive enjoyment of the right.

[2] Explanation iii, sec. 15, Act V of 1882; Carr *v.* Foster, 3 Q. B., 581, 585; Goddard, 159. Under such circumstances the easement continues to be constructively enjoyed. Goddard, 159.

[3] I. L. R., 1 Calc., 422, 430.

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*mitted* to for *one year* after *notice*, before the enjoyment could be said to be "interrupted" within the meaning of the law on this subject. The cessation of actual user must be caused by an obstruction by the act of some person *other* than the claimant himself.[4] And the obstruction must be submitted to, or *acquiesced in*, for one year after the claimant has *notice thereof*, and of the *person* making or authorizing the same to be made.[5] The existence of the physical obstruction, of itself, is not sufficient notice, as it does not show by whom or by whose authority the obstruction is put up.[6] In order to negative submission or acquiescence, in a case where the obstruction cannot be summarily removed, it is enough if the claimant communicates, in a reasonable manner, to the party causing the obstruction that he does not really submit to or acquiesce in it.[7]

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[4] A more *voluntary* act of the *claimant* not amounting to a "discontinuance" is not sufficient. I. L. R., 1 Calc., 422. The obstructive act must be committed by the *servient* owner or by a *stranger*. Davies *v.* Williams, 16 Q. B., 546; Goddard, 160.

[5] Sec 26, Act XV of 1877; sec. 15, Act V of 1882. It has been held in England, that an interruption occurring after an enjoyment of nineteen years and a half, and lasting for six months, will not prevent the acquisition of a right at the end of twenty years. Thomas *v.* Flight, 8 Cl. and Fin., 231. This case is referred to in I. L. R., 6 Calc., pp. 399, 404. In British India, *after* the twenty years, the interruption may last for nearly two years without destroying the right.

[6] Siddon *v.* Bank of Bolton, 19 Ch. Div. (24th January 1882).

[7] Glover *v.* Coleman, 10 L. R., C. P., 108; Tudor, p. 186. The claimant must do something which shews that he is "not satisfied to submit." It is not *necessary* to take active steps to remove the obstruction or bring an action within the year. The fact whether the claimant has submitted to or acquiesced in the obstruction must be determined with reference to the circumstances of each case. The claimant cannot, by mere fruitless protests, defer the bringing of an action for several years. Resistance of the interruption by *some* of a body of persons claiming the right is sufficient. See Gale, 176 (note); Goddard, 160; I. L. R., 1 Mad., 339.

Effect of repeated adverse obstructions, and voluntary discontinuances.

Repeated interruptions *in fact*, or adverse obstructions, though not continued, and submitted to, for one year, are good evidence to show that the enjoyment was not peaceable.[8] A voluntary *discontinuance* of the enjoyment of a right, which is in *course* of acquisition by user, operates in the same way as an *abandonment* or permanent relinquishment of a right *already* acquired. After the discontinuance or abandonment, the right cannot be constructively enjoyed.[9] The want of the determination to exercise or enjoy the easement puts the enjoyment which would otherwise have continued to an end. If the dominant owner bricks up a doorway, or substitutes a blank wall for a wall in which there is a window, he renders it physically impossible to exercise his right of way or his right to light through the door or window ; and if the obstruction is allowed to continue for a considerable period, the enjoyment, in the absence of other evidence, may be presumed to have been discontinued or abandoned. Such voluntary discontinuance of user, though not an *interruption* within the meaning of sec. 26 of Act XV of 1877, or sec. 15 of Act V of 1882, prevents the acquisition of the easement. A person who incapacitates himself by his own act from any possible use or enjoyment of the easement, cannot be said to enjoy the easement openly claiming a right thereto.[10] He cannot, for this reason, acquire a right by pres-

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[8] Eaton *v.* Swausea Waterworks Company, 17 Q. B., 267 ; Goddard, 154.

[9] See I. L. R., 1 Calc., 422, 429. The *continuity of user*, which is to establish a right by prescription, is broken by *discontinuance*. See p. 427, *ibid.* As to the three kinds of *interruptions*, see p. 404, note, *supra*.

[10] See Sham *v.* Tariny, I. L. R., 1 Calc., 422, 430.

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cription, unless, indeed, he *resumes* the enjoyment, and continues to enjoy for a *fresh* period of twenty years.

Effect of interruptions in enjoyment as *an easement* and *as of right.*

Interruptions in the enjoyment of an easement *as such*, by reason of unity of possession, at any time during the twenty years, though *technically* not *interruptions*, break the continuity of the requisite enjoyment, and destroy altogether the effect of the previous user.[1] Interruptions in the enjoyment of an easement *as of right* (except in the case of light, air or support under Act V of 1882), by reason of the claimant asking the leave or permission of the servient owner during the twenty years, also break the continuity of the requisite enjoyment.[2] In these cases, although there is no interruption in the enjoyment *in fact* by an adverse obstruction, the claimant cannot be said to have enjoyed the right *as an easement* or *as of right*, for the period of *twenty years* ending within two years *next* before the suit.

Computation of the prescriptive period.

An enjoyment next before *some* action or suit, in which the claim is brought into question, confers a right (under 2 and 3 Will. IV, c. 71), which may, in England and Ireland, be set up in every subsequent action and suit.[3] But, in British India, in *every*

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[1] Onley *v.* Gardiner; Gale, 215, 216. In one case of a right to *light* (Ladyman *v.* Grave, 6 L. R., Ch. App., 763), two different periods of enjoyment, disconnected by unity of possession in the interval, were allowed to be added together to make up the twenty years required by the law; see Gale, 172; Goddard, 155. According to the Indian law, in every case, the period of twenty years must *end* within two years *next* before the suit, and an easement of light, like any other easement, must be enjoyed *as an easement* for such period.

[2] See Goddard, 156, 157.

[3] Cooper *v.* Hubbuck (12 C. B., N. S., 456, Williams, J., diss.); Gale, 174; Goddard, 128.

suit wherein the claim is contested, the period of enjoyment is to be computed with reference to that *particular* suit, except, of course, where the servient owner is *estopped*, by a former judgment, from effectually contesting the claim.

The prescriptive period of twenty years may begin with the *first act* of enjoyment, except in the case of an easement to *pollute the water* of a private river, tank, &c. The enjoyment of such an easement, so long as the servient heritage is not *perceptibly* prejudiced by it, is not to be taken into account. The period begins to run when the pollution first becomes perceptibly prejudicial to the riparian or other servient owner.[4]

In computing the period of twenty years, the time during which the servient owner has been under a disability is not excluded.[5]

Conditional exclusion in favor of reversioner of servient heritage.

But, under sec. 27, Act XV of 1877, and sec. 16, Act V of 1882, if the servient heritage has not been in the possession of the full owner, but has been under a lease for a term exceeding three years, or has been subject to an interest for life, the time during which such lease or interest has continued, is *conditionally* excluded from the computation of the period, —that is, *provided* the person entitled to the servient

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[4] Pollution of water, at first slight and imperceptible, often gradually increases by reason of the increase of the dominant manufactory, or town, which pours its sewage or other foul matter into the nearest brook or river. See Goldsmid *v.* Tunbridge Commissioners; Goddard, 210, 243; and Expl. iv, sec. 15, Act V of 1882.

There can be no prescription to make a common nuisance which is a prejudice to all people. There can be no prescription to send sewage into a *public* river. Gale, 484 (note).

[5] See Arzan *v.* Rakhal, I. L. R., 10 Calc., 214.

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heritage on the determination of such term or interest resists the claim within three years next after such determination. It is only under this provision that two periods of valid enjoyment, separated by a period of invalid enjoyment, may be *tacked together* to make up the required enjoyment for twenty years. The period of continuous enjoyment, partly valid and partly invalid, may, in this case, extend back to a time which is *more* than (20 + 2) twenty-two years before the suit. And here the *express* provision of the law introduces an exception to the rule which requires a valid enjoyment for twenty years ending within two years *next* before the institution of the suit.[6]

Effect of the exclusion.

The effect of this provision is not to *unite* two *discontinuous* periods of valid enjoyment, but to *extend* the period of *continuous* enjoyment by so long a time as the term or life-interest continues.[7] Where the lessor or reversioner of the servient heritage resists the claim within the time allowed, the claimant must show twenty years' valid enjoyment either *wholly before* the beginning of the term or life-interest, if such term or interest subsisted at the *commencement* of the two years next before the suit; or *partly before and partly after*, if such term or interest ended *more* than two years before the suit.[8] Evidence of user for fifteen years before the commencement of the term or life-estate, user during the term or life-estate, and user for five years after the term or life-estate, continuously down to within two years of the suit, would be sufficient to establish the

[6] Gale, 184; Tudor, 191; Goddard, 134, 135.

[7] *Per* Parke, B., in Onley *v.* Gardiner, 4 M. & W., 500.

[8] See Goddard, 134, 135.

right. But non-enjoyment during the term or life-estate would prevent the two periods of valid enjoyment from being tacked together. The time excluded from the computation is excluded for the benefit of the lessor or reversioner, and not for the benefit of the claimant. The latter must show valid enjoyment for twenty years, besides uninterrupted enjoyment during the time which has to be excluded.[9]

The rule of prescription how far binding on Government.

Before the enactment of a law of prescription proper in British India, it was held by the Madras High Court (in *Ponnusawmy* v. *The Collector of Madura*, 5 Mad., 6), that the right to an easement was as valid against the Government as it was against a private owner of land. There can be no doubt that the *presumption* of a right arising from long enjoyment arises against the Government in the same way as it does against private individuals.[10]

But the question whether an easement may be acquired *against* the Government in respect of property belonging to the Government, under a rule of *statutory* prescription, when such rule does not expressly embrace the Government, has not been directly answered in any reported Indian case that I know of. In the English Statute of Prescription (2 & 3 Will. IV, c. 71), the Crown is named in secs. 1 and 2 (which relate to the acquisition of profits and easements in general), but is not named in sec. 3 (which relates to the particular easement of light),

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[9] See Clayton *v.* Corby, 2 Q. B., 813; Pye *v.* Mumford, 11 Q. B., 675; Gale, 185. Interruption by the termor or life-tenant, or any other person, even during the time which has to be *excluded* from the computation of the prescriptive period, prevents the acquisition of the right.

[10] See p. 199 (note 4), *supra*.

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and it has been laid down, that the Statute being of the nature of a law of limitations, the Crown is not *prejudicially affected* by the provisions of sec. 3 of the Statute.[1]

According to the rule of construction mentioned at page 199, *supra*, sec. 26 of Act XV of 1877 would seem not to be applicable to the acquisition of easements in or upon or in respect of property belonging to Government. But the Calcutta High Court, in *Arzan* v. *Rakhal*,[2] assumes that the section does apply to such acquisition against the Government.[3] It is very likely that the framers of Act IX of 1871 and Act XV of 1877 took the same view of the matter. But now, the last paragraph of sec. 15, Act V of 1882, expressly provides, that the *twenty* years' rule shall not apply where the *servient* heritage belongs to Government. In analogy to the law of limitation applicable to suits by Government, it is provided that the enjoyment of an easement must continue for *sixty* years before a right to it can be acquired *against* Government, by positive prescription under the Act.[4]

Prescription in British India does *not* imply a grant.

A right acquired under the positive enactments referred to above (like the right to light under 2 and 3 Will. IV, c. 71) is matter *juris positivi*, and does not require any presumption of a grant.[5] The theory

[1] Brown, 243; *Doe d* The Queen *v.* The Archbishop of York, 11 Q. B., 81. The Crown, however, may take *advantage* of the provisions of the law against a subject.

[2] I. L. R., 10 Calc., 214, 219.

[3] See p. 199, *supra*.

[4] But there is no express provision in Act V of 1882 which precludes the Courts from *presuming* a grant from twenty, thirty or fifty years' user of an easement against the Government. See Banning, 252; 11 East, 488.

[5] See Tapling *v.* Jones; Goddard, 125, 126, 172.

of presumed grants is not recognized by either Act XV of 1877 or Act V of 1882.[6] The objection that the easement in a particular case was not or is not capable of being *granted*, cannot, *per se*, prevent the acquisition of such easement by statutory prescription in British India. Property belonging to a person who cannot alienate it or impose an easement upon it, may be subjected to an easement by prescription under the Acts.[7]

The rule applies to negative as well as to affirmative easements.

Section 26 of Act XV is (expressly) applicable to affirmative, as well as to *negative*, easements, and there is nothing in sec. 15, Act V of 1882 which restricts its application to affirmative easements only. There is, therefore, no valid objection to the acquisition of a *negative*[8] easement by prescription under these Acts. Whether the inchoate enjoyment of such an easement, before it has matured into a right, is an actionable wrong, or not, does not affect the question, if it is capable of being physically interrupted by some erection, excavation, or other act done upon the servient heritage.

Interruption of enjoyment of easement need not be conveniently practicable.

It is not necessary that resistance to, or interruption of, the enjoyment of an easement, should (as suggested by certain English cases) be *conveniently* practicable. The policy of the law in favor of possessory titles would be defeated, if the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting a particular easement, affected the question of its acquisition by prescription.[9] When the right

[6] See Report of the Select Committee. dated 6th July 1881, India Gazette, Part V, p. 1017; Arzan *v.* Rakhal, I. L. R., 10 Calc., 214.

[7] See Lemaitre *v.* Davis, 19 Ch. D., 211.

[8] The English *Statute* does not apply to negative easements other than the right to light, see Gale, 169; 3 Exch., 557.

[9] See Lord Selborne's judgment, 6 App. Cas., 796—799.

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claimed is too large and indefinite in its nature, and incapable of definite enjoyment, it may not be expedient to hold that such right may be acquired by prescription ;[10] but the language of the Acts does not prevent its acquisition, so long as it is capable of *open* enjoyment by the dominant owner, and the user is capable of being, *anyhow*, *interrupted*. It may be *contended* that the user of a right which is *incapable* of being interrupted by any physical obstruction on the servient heritage, and which is also incapable of being prevented by action, is, *practically*, user or enjoyment *without interruption*. But the interpretation which has been put upon the words "enjoyed without interruption" in the English Statute, is, that a thing which is *incapable* of interruption cannot be said to be "enjoyed without interruption."[1] The enjoyment of light and air may be easily interrupted by hoardings, &c. The enjoyment of lateral support is also capable of being physically interrupted, and is, at least theoretically, actionable. The enjoyment of a

But enjoyment must be *capable* of interruption.

[10] See 6 App. Cas., 759, 798, 824.

The following are some of the cases in which it has been held, in England, that certain rights cannot be acquired by prescription :

Webb *v.* Bird, 10 C. B. (N. S.), 282 ; 13 *ibid*, 841 (claim to have free access for all the winds of heaven to the sails of a windmill);

Attorney-General *v.* Doughty, 2 Ves., Sen., 453 (claim to unobstructed prospect) ;

Chasemore *v.* Richard, 7 H. L. C., 349 (claim to percolating water not passing in a definite channel) ;

Bryant *v.* Lefever, 4 C. P. D., 172 (claim to free access of wind to and from a chimney for the egress of smoke) ;

Sturges *v.* Bridgeman, 11 Ch. D., 852 (claim to make a noise in one's own house, and to set the air or ether in motion, when such noise did not cause annoyance to any neighbouring proprietor at the beginning of the prescriptive period).

[1] See Webb *v.* Bird, 10 C. B. (N. S.), 282 ; Goddard, 119, 120 ; Sturges *v.* Bridgeman, 11 Ch. D., 852.

right of way is both physically and legally preventible. If a man, by working certain machines in his *own* house, makes a noise, and sets the air or ether in motion, so as to interfere with the physical comfort of his neighbour, such neighbour cannot prevent the noise except by suing out an injunction. If the adjoining lands are unoccupied, and no damage is caused to anybody by the noise, it is not preventible either physically or legally. If such adjoining lands are subsequently occupied, the previous enjoyment of the owner of the machines does not prevent the new occupiers from suing him for the nuisance. But supposing the *occupiers* of the adjoining lands *neglect* to prevent the making of the noise for twenty years, the owner of the machines may acquire by prescription an easement of setting the ether in motion over the adjoining lands, to the discomfort of their owners and occupiers.[2]

What easements cannot be acquired by prescription.

The only easements which cannot be acquired by prescription under Act V of 1882, and presumably under Act XV of 1877, are the four classes of rights which are mentioned below:[3]

1. Right destructive of servient heritage or of subject.

1. Rights which would *tend* to the *total destruction* of the servient heritages, or of the subjects of the rights. In *Dyce* v. *Lady James Hay*,[4] the Lord Chancellor said, that "Neither by the law of Scotland, nor of England, can there be a prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands

[2] See Sturges *v.* Bridgeman; Goddard, 121, note (d).

[3] See sec. 17, Act V of 1882.

[4] 1 Macq. H. L. Cas., 905.

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affected."[5] The learned editors of Gale's work on Easements are of opinion, that this rule applies *only* to cases where a large and *indefinite number* of persons claims a right in the nature of an easement.[6] A claim of a profit *in alieno so*, in order to be valid, must, according to English law, be made with some limitation or restriction.[7] An indefinite claim to destroy the subject-matter (*e. g.*, by taking away minerals which are part of the soil, or destroying a fishery) cannot be supported in law.[8] The rule laid down in Act V of 1882 applies to *all* prescriptive easements and profits which *tend* to the *destruction* of the servient heritage or of the subject of the right. In *Joy Doorga* v. *Juggernath*,[9] Macpherson and Mookerjee, JJ., held, that no length of time can give a party such a right as destroys all the ordinary uses of the servient property,—*e. g.*, a straggling right to the promiscuous use of a whole property for the purpose of driving cattle over it. And, according to Act V of 1882, if the exercise of the right is likely to be *destructive* of the servient property or its usufruct, it cannot be acquired by prescription. If the servient owner has actually *granted* such a right, he is, of course, bound by his grant.

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[5] Goddard, 224. [6] Gale, 4 & 20. [7] Tudor, 135; p. 353, *supra*.

[8] See 7 App. Cas., 646; and Phear, 81, 83.

[9] 15 W. R., 295. See also M. Zumur v. M. Doorgaben, 1 W. R., 230, where Kemp and Glover, JJ., held, that the right claimed by prescription must not be so large as to extinguish or destroy all the ordinary uses or profits of the property. In Durgachurn v. Kalikumar, 8 C. L. R., 375, Sir Richard Garth, C. J., held, that a right of way in *every* direction over the defendant's land or water cannot be claimed by prescription. In order to acquire a right by prescription, the claimant must prove the exercise of the right of way in a *particular* direction.

2. Right to free passage of light or air to open space.

2. Under para. 1 of sec. 26 of Act XV, and under para. 1 of sec. 15 of Act V, a right to unobstructed light or air can only be acquired for the benefit or in respect of *buildings;* and sec. 17 of Act V declares that a right to the free passage of light or air to an *open space of ground* cannot be acquired by prescription in any case. It has been held in England, that such a right cannot be so acquired in respect of a timberyard and sawpit.[10]

3 Right to surface-water not flowing in a stream, and not permanently collected. 4. Right to underground water not passing in defined channel.

3 and 4. Every owner of land has a *natural* right to collect and dispose, within his own limits, of all water on or under its surface, which does *not* pass in a *defined* channel.[1] Clauses (*c*) and (*d*) of sec. 17 of Act V enact, in accordance with the principle of the ruling in *Kena Mahomed* v. *Bohatoo Sircar*,[2] that a right to the uninterrupted flow of such waters cannot be acquired by a neighbouring proprietor by prescription. If surface water reaches and flows in some *definite* channel, or if it is *permanently collected* in a pool, tank or otherwise, then, and then only, may a right to such water be acquired by a neighbour by prescription. Similarly, a right to underground water, which does not pass in a defined channel, but merely *percolates* through the strata in unknown channels, cannot be acquired by prescription. The owner of the land may divert such underground water, even if it had been allowed to percolate the soil, and to pass into the claimant's land for twenty years and upwards.[3] But the owner of land has no

[10] Goddard, 176; see also Potts v. Smith, L. R., 6 Eq., 311.

[1] See Illus. (*g*), sec. 7, Act V of 1882. [2] Marshall's Report, 506.

[3] See Chasemore v. Richards, 2 H. and N., 168; 7 H. L. Cas., 349; Goddard, 199; Tudor, 196. One of the reasons given for the decision

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such right to percolating water under the surface of his land, as would prevent his neighbour from draining away the water by lawful operations on his own soil.[4]

Rights acquired by prescription are absolute and permanent.

The right to an easement acquired by prescription under Act XV of 1877, or Act V of 1882, whether acquired by an occupier or owner of the dominant heritage, becomes permanently appurtenant to such heritage as an absolute and indefeasible right.[5] If acquired by an occupier of such heritage, it is acquired on behalf of the owner,[6] and continues until it is abandoned or released by such owner or extinguished by operation of law.[7] Prescription under

in Chasemore *v.* Richards, was that the owner could *not prevent or stop* the percolation of water. But as percolating water *may* be diverted and appropriated by the owner, the use of it by another is *capable* of interruption. Under Act V, sec. 17, the question whether such user is *preventible* or not does not arise.

[4] Acton *v.* Blundell, 12 Mees. and W., 324; Tudor, 196. There are streams which sink underground, pursue for a short space a subterraneous course, and then emerge again. Such underground water flows in a known and *defined* channel, and the rule as to percolating water does not apply to it. Tudor, 197.

[5] Sec. 26 of Act XV expressly says, that the right acquired shall be absolute *and indefeasible*. Sec. 15, Act V, says, that the right shall be *absolute*. It is apprehended that the Legislature did not intend to alter the law by the omission of the words "and indefeasible" from sec. 15. It is possible, however, that as sec. 43 of Act V renders the right *defeasible* by certain attempts to *extend* the user, the term "indefeasible" is omitted with the object of meeting Lord Westbury's argument in Tapling *v.* Jones. See Goddard, 307, 308; p. 443 (note), *infra*.

[6] See Goddard, 89; sec. 12, Act V of 1882.

[7] Even a sale of the servient estate or tenure (free from encumbrances) for arrears of revenue or rent, does not, it is apprehended, extinguish a *prescriptive* easement. But the acquisition of land (absolutely and free from encumbrances) under the Land Acquisition Act, does, it has been held, extinguish incorporeal rights of the nature of easements. (See Collector *v.* Nobin, 3 W. R., 27; *In re* Fenwick, 14 W. R., Cr., 72.) As to the implied grant of easements necessary *for* the land so acquired, see p. 395 (note), *supra*. Easements expressly *imposed* by the servient owner *are* extinguished by a sale for arrears of revenue or rent. See illus. (*c*), sec. 37, Act V of 1882.

these Acts gives a good title against all persons, including the owner of the servient heritage, even where such heritage was in the possession of a temporary tenant at the time of the acquisition, provided the owner did not avail himself of the special proviso in sec. 27 of Act XV, or sec. 16 of Act V.[8] A right acquired under these Acts being absolute, is not subject to any condition or qualification.[9] Enjoyment of an easement for the prescribed period under a grant imposing an easement, but subject to an express or implied condition, does not confer an indefeasible right, and is therefore not vaild under sec. 26 of Act XV, or sec. 15 of Act V. But where a right *is* acquired under these sections by a valid enjoyment for the prescribed period, the right is absolute and indefeasible.

Prescription legalizes previous user.

The inchoate enjoyment of an affirmative easement, before it ripens into an absolute right by prescription, gives the servient owner a right to sue for a series of trespasses; but as soon as the prescriptive right is acquired, the whole of the previous user is legalized from its commencement.[10]

Extent and mode of enjoyment of prescriptive rights.

When an easement has been acquired by prescription, questions as to the *extent* of the easement frequently arise. The general rule on the subject is, that the *extent* of the easement and the *mode* of its enjoyment must be determined by the accustomed user of

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[8] Tenants holding permanent and transferable tenures even under the *same* zemindar may acquire easements against each other. See Large *v.* Pitt, and Statement of Objects and Reasons, Ind. Gaz., 13th Nov. 1880.

[9] See Lord Westbury's judgment in Tapling *v.* Jones, 11 H. Lds., 290; Gale. 607.

[10] Wright *v.* Williams; Goddard, 126.

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the right.[1] The Court, however, is not bound to found its judgment entirely upon the actual user proved. It may, and should, take into consideration the surrounding circumstances connected with the actual user. If a way was used for the several purposes for which it was *wanted* during the prescriptive period, there may be a ground for inferring that there was a right of way for *all* purposes; but if the user was confined to one purpose, or to particular purposes only, the Court would not be justified in finding that the right extended to all purposes.[2] Though a carriageway may include a horseway, it does not necessarily include a drift way, the general rule being that, in the absence of evidence of the purpose for which the right was acquired, a right of way of any one kind does not include a right of way of any other kind.[3] Where a right of way to and from a certain house has been acquired, it may be used not only by the dominant owner, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers, for such user is necessary for the beneficial enjoyment of the house to which the right is appurtenant. So, if the house is let to a tenant, the tenant may use the way, and the owner also may use it for the purpose of collecting the rent and seeing that the house is kept in repair.[4]

How far mode and place of enjoyment may be altered.

When the exercise of an easement can, without prejudice to the dominant owner, be confined to a

[1] Goddard, 221, 247; cl. (*d*), sec. 28, Act V of 1882; 13 C. L. R., 152.

[2] Cowling *v.* Higginson; Goddard, 248.

[3] Ballard *v.* Dyson; Goddard, 249; sec. 28, Act V of 1882.

[4] Illus. (*b*), sec. 21, Act V of 1882. Where an easement is appurtenant to a house, the right is not affected by the owner of the house letting the house to a tenant. M. Amjadee *v.* Syed Ahmed, 6 W. R., 314.

determinate part of the servient heritage, such exercise must, at the request of the servient owner, be so confined.[5]

Subject to this rule, the dominant owner may alter the mode and place of enjoying the easement, provided he does not thereby impose any additional burden on the servient heritage.[6] But the dominant owner of a right of *way* cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.[7]

It has been held, that a prescriptive right of passage for boats over another man's channel is like a prescriptive right of way over another man's private road, and that the servient owner may decrease the width of the channel or the road, if, by so doing, he does not render the exercise of the right less easy than it was before.[8]

Extent of prescriptive right to receive light or air, or to pollute air or water.

The extent and mode of enjoyment of a *prescriptive* easement is generally determined by the accustomed user of the right; but two *special* rules are laid down by sec. 28, Act V of 1882, in respect of (*a*) the right to the *passage of light or air* to an opening; and (*b*) the right to *pollute air or water:* 1. The extent of the first right is, that *quantum* of light or

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[5] Sec. 22, Act V of 1882.

[6] An easement is not lost by a slight variation in the enjoyment of it. *Per* Phear, J., I. L. R., 1 Calc., 422, 427.

[7] Sec. 23, Act V of 1882; see also Goluck *v.* Tarini, 4 W. R., 49. In Syud Hamid *v.* Gervain, 15 W. R., 496, Norman, J., held, that a person having a prescriptive right of way from one place to another, over a particular line, cannot be compelled to use a different and substituted way. It is otherwise with a right to use another's pathway. The *servient* owner *may* slightly alter the direction of the pathway.

[8] Durga Churn *v.* Kali Kumar, 8 C. L. R., 375.

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air which has been accustomed to enter the opening during the *whole* of the prescriptive period, irrespectively of the *purposes* for which it has been *actually* used.[9] 2. The measure of the second right is the extent of the pollution at the *commencement* of the prescriptive period.[10]

Implied acquisition of accessory or secondary easements.

When an easement has been acquired by prescription or otherwise, *accessory* rights to do acts necessary to secure the full enjoyment of the easement are also acquired. A's easement to draw water from B's well gives A a right of way, over B's land, to and from the well. Where a right of way has been acquired, if the

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[9] But it does not follow that the *purposes* for which the *light* has been *actually* used by the dominant owner should not be considered in finding whether an alleged disturbance is *actionable* or not. If the disturbance does not prevent the dominant owner from carrying on his *accustomed business* as beneficially as he had done previous to instituting the suit, he suffers no *substantial* damage, and cannot sue for compensation or for an injunction. See secs. 33 and 35, Act V of 1882. As to whether an *injunction* may be sued for when a *threatened* act of disturbance is not likely to cause *substantial* damage in this sense, see cl. (*b*), sec. 35. It has been held that, under *ordinary* circumstances, the fact that 45 degrees of sky are left unobstructed by a building opposite to the light is *primâ facie* evidence that there is not likely to be *material* injury. If the building is not higher than the distance between the window and the building, *i. e.*, if the angle of incidence of light over the building to the window is not more than 45 degrees, the Court will not interfere by injunction, unless it is proved that, under the circumstances of the particular case, the building is likely to cause material injury to the plaintiff. See 9 L. R., Ch. Div., App., 220; Goddard, 316; Gale, 639; Tudor, 225; Cathrine Clement *v.* J. Melamy, decided by Wilson. J., on the 12th August 1884, and reported in the "Englishman" of the 18th August 1884. Cf. Parker *v.* First A. H. Co., 24 Ch. D., 282.

Light prevented falling at an angle of 45 degrees.

As to the extent of the easement of light, see Moore *v.* Hall, 3 Q. B. D., 178; Ecclesiastical Commissioners *v.* King, 14 Ch. D., 213; Radhamohun *v.* Rajchunder, 2 C. L. R., 377. On this subject Mr. Gibbons, in his preface to the 5th edition of Gale's Work, remarks, that "there are cases to meet every taste." See also Ratanji *v.* Edalji, 8 Bomb., 181.

[10] The prescriptive period, in the case of pollution of *water*, does not *begin* until the pollution *perceptibly* prejudices the servient heritage.

way is out of repair, or a tree is blown down and falls across it, the dominant owner may enter the servient heritage, and repair the way or remove the tree from it. If the *servient* owner renders the way impassable, the dominant owner may deviate from the way and pass over the adjoining land of the servient owner. Where A has an easement of support from B's wall, and the wall gives way, A may enter upon B's land and repair the wall.[1]

Extinction of prescriptive right: 1. When released. 2. When they become useless. 3. When there is increase of burden by permanent change in dominant heritage. 4. When there is permanent alteration of servient heritage by *superior force*. 5. When either heritage is completely destroyed. 6. When there is unity of title.

A prescriptive easement, like other easements, is extinguished when the dominant owner expressly, or impliedly, releases it to the servient owner.[2] It is also extinguished when it becomes incapable of being at any time, and under any circumstances, beneficial to the dominant owner.[3] Except in the case of an easement of support, where by any *permanent change in the dominant heritage*, the burden on the servient heritage is *materially* increased (*e. g.*, by enlarging windows and increasing their number for the increased access of light and air), and such increase *cannot* be reduced by the servient owner without interfering with the accustomed and *lawful* enjoyment of the easement, the easement is (under Act V of 1882) entirely extinguished.[4] Where an excessive user of an easement may be obstructed by the servient owner by something done on the *servient* heritage (as, where

[1] See sec. 24, Act V of 1882. As to the right to go *extra viam* in the case of *highways*, see Gale, 547.

[2] Sec. 38, Act V of 1882. [3] Sec. 42, Act V of 1882.

[4] Sec. 43, Act V; Cf. Gale, 609, 615, 616; Goddard, 360, 383. But rights to light under the Prescription Act in England, and Acts IX of 1871 and XV of 1877 in India, are *not* extinguished by excessive user. See Goddard, 384, and Provabutty *v.* Mohendro, I. L. R., 7 Calc., 453. Where rights are declared to be *indefeasible*, they cannot be defeated in this way except under an express law. See note 5, p. 438, *supra*.

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7. When the right has not been enjoyed for 20 years.

100 buckets of water, instead of 50, are taken from the servient owner's well) he may obstruct the user, provided such obstruction does not interfere with the *lawful* enjoyment of the easement.[5] Where the excessive user is due to a *permanent change in the dominant heritage*, and the excess or encroachment *cannot* be *lawfully* obstructed (as in almost all cases of excessive user of a *negative* easement), the whole easement is extinguished, except where the injury caused by the excess is so slight that no reasonable person would complain of it. A prescriptive right, as well as other easements, may also be extinguished by a *permanent alteration* of the *servient* heritage by superior force, or by the *complete destruction* of *either* the dominant or servient heritage, or by unity of ownership (with or without unity of possession) of the *whole* of *both* the heritages.[6] If the *destroyed* tenement is re-formed or re-built before twenty years have expired, an easement extinguished by destruction of either heritage may *revive*.[7] Lastly,[8] easements acquired by long enjoyment, like easements otherwise acquired, may be

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[5] Sec. 31, Act V of 1882.

[6] As to the destruction of the dominant heritage causing extinction, see 1 Hunooman Pershad's Rep., 196. See also secs. 44, 45 & 46 of Act V of 1882. Goddard. 360, 367. As to unity, see p. 417, *supra*.

Easements are liable to be extinguished by *estoppel* also. Extinguishment by revocation and some other modes are not applicable to prescriptive rights. See note 7, p. 438, *supra*.

[7] See sec. 51, Act V of 1882.

[8] In America, this mode of extinction is confined to *prescriptive* rights only. In England, non-user of an easement is regarded merely as *evidence*, from which a *release may* be *implied*. As in the case of acquisition by prescription, Act V of 1882 does not assume that a fictitious *grant* has been made by the servient owner, so, in the case of extinction by prescription, the Act rejects the English doctrine that non-user is only evidence of a presumed non-existing release. See Statement of Objects

extinguished by non-enjoyment. Under Act V of 1882, the same period (twenty years) is fixed for the extinction of an easement by non-enjoyment, as for the acquisition of an easement by enjoyment. No *special* rule has been laid down for the extinction of an easement acquired by or against Government. The following rules have been enacted by sec. 47 of the Act:

Rules of extinctive prescription under Act V of 1882.

1. A continuous easement (as an easement of light) is extinguished when it totally ceases to be enjoyed as an easement for an unbroken period of twenty years. The period of twenty years is, in this case, to be reckoned from the day on which the enjoyment of the right is *obstructed* by the *servient* owner, or *rendered impossible* (as by bricking up a window) by the *dominant* owner.[9] If the dominant owner does not, by his own act, render it impossible to enjoy the easement, or if it is not obstructed by the servient owner, mere non-user of the right for any period does not extinguish a continuous easement. A cessation of enjoyment in pursuance of a contract between the dominant and servient owners does not extinguish the right. Enjoyment by one of several co-owners prevents extinction.

2. A discontinuous easement (as a right of way) is

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and Reasons, India Gazette, 13th November 1880, Part V, p 470. As to the English law on the subject of non-user, see Moore v. Rawson, 3 B. and C., 322; Brown, 227 *et seq*; Goddard, 367 *et seq*.

[9] If the act of the dominant owner manifests an *intention* on his part to abandon the easement permanently, the dominant heritage being also *permanently* altered for the purpose, the easement will be at once extinguished by an implied release. See sec. 38, Act V. Justice Phear, in Shamachurn's case (I. L. R., 1 Calc., 422, 426), was inclined to hold that abandonment *qua* abandonment could not be materially operative unless something had been done by the servient owner on the faith of the abandonment so as to be a cause of *estoppel* against the dominant owner. See also The Queen v. Chorley, 12 Q. B., 515; Tudor, 232.

LECTURE XII. extinguished when it has not been enjoyed as an easement for an unbroken period of twenty years—such period being reckoned from the day on which it was *last enjoyed* by any person as owner or occupier of the dominant heritage. But if, before the expiry of the twenty years, the dominant owner registers (under the Indian Registration Act, 1877) a declaration of his intention to retain such easement, it shall not be extinguished under this rule, until a period of twenty years has elapsed from the date of registration. A cessation of enjoyment in pursuance of a contract between the dominant and servient owners, or a cessation of enjoyment by only *some* of several co-owners, does not extinguish the right. Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, enjoyment of any of the ways (being virtually an enjoyment of a *part* of a whole) will prevent the extinction of the easement.

3. Enjoyment or exercise of a right by the owner or occupier of the dominant heritage in *ignorance* of his *right* to do so, or the exercise of a right accessory to the easement, is not such enjoyment of the easement as would prevent its extinction under sec. 47. And where an easement is exercisable only at a *certain place* or at *certain times*, or between certain hours, or for a *particular purpose*, its exercise during the twenty years at *another* place, or at *other* times, or between *other* hours, or for *another* purpose, is not such enjoyment as is necessary to keep alive the easement.

4. The circumstance that, during the twenty years, no one was in possession of the servient heritage, or

that the easement could not (by reason of an accident or otherwise) be exercised, or that the dominant owner was not aware of its existence, does not exempt the dominant owner from the penalty of *extinction* under this law.

Where the dominant owner exercises for twenty years a right less extensive than that to which he is entitled, some systems of law lay down that his easement shall be *reduced* to the right *actually* exercised. Act V of 1882 *omits* all provisions on this head.[10]

The extinction of the primary easement, necessarily extinguishes accessory or secondary easements.

It should be observed that the positive rules of extinctive prescription laid down by sec. 47 of Act V of 1882 are *not declaratory* of the law as it existed before their enactment, and that such rules are not of any force, except in provinces to which the Act has been extended.

Analogous rules under the English and the old Indian law.

The English law does not require the same amount of proof of the *extinction* as of the original *establishment* of the right.[1] But the *mere* cessation of enjoyment is not sufficient to extinguish an easement.[2] An easement is abandoned or extinguished by non-user, (*a*) if the surrounding circumstances clearly shew that the dominant owner *intends* to relinquish it permanently;[3] or (*b*) if the circumstances are such as are calculated to mislead the servient owner and cause

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[10] See Statement of Objects and Reasons, India Gazette, 13th November 1880.

[1] Gale, 386.

[2] Crossley *v.* Lightowler, L. R., 3 Eq., 279; L. R., 2 Ch., 482; Goddard, 368.

[3] *Ibid.*

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him to incur expense or loss on the reasonable belief that the right has been permanently relinquished ;[4] or (*c*) if the cessation of user has been caused by an *adverse* act *acquiesced* in by the dominant owner.[5] If there are *no* circumstances to aid the presumption of an abandonment or the reverse, no presumption of an abandonment ought to be made until non-user has continued for twenty years, but there are cases in which even this would not be sufficient. The duration of the non-user must always be considered in conjunction with the nature of the easement, and the surrounding circumstances if any.[6] Non-user for 106 years of a right of access to mines, has not, by itself, been considered sufficient.[7]

Although the mere suspension of the exercise of an easement is not sufficient to prove an intention to abandon it, in the case of a long continued suspension the *onus* lies upon the dominant owner of shewing that some indication was given, during the time, of his intention to preserve it, or that he intended to resume it within a reasonable period.[8] The effect of long continued non-user may be *explained away* by showing that the dominant owner had no occasion to use the easement, or that the cessation occurred in consequence of an agreement whereby he gave up his right temporarily, or that the non-user was a consequence of the temporary substitution of another

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[4] Stokoe *v.* Singers, 8 E. & B., 31 ; Gale, 594 ; Regina *v.* Chorley, 12 Q. B., 515 ; Gale, 596.

[5] Regina *v.* Chorley. See also Bance *v.* Ram, 10 W. R., 316.

[6] Goddard, 371. [7] Goddard, 368, 370.

[8] Crossley *v.* Lightowler ; Weston *v.* Arnold, 8 L. R., Ch. App., 1084 ; Tudor, 232.

and a more convenient mode of enjoying the easement.[9]

In England, a right of way was held not to have been extinguished by mere non-user for a period much longer than twenty years, the effect of the non-user being explained away by the fact that the dominant owner had a more convenient mode of access through his own land.[10] On the other hand, it has been held by a Division Bench of the Calcutta High Court, that a right of passing freely over another's land requires to be kept up by constant use, and that if the use of such right is discontinued for the space of six years, it cannot be re-established by suit.[1] In *Khetternath* v. *Prosunno* (7 W. R., 498), Justice Markby laid down, that the abandonment of an easement, as well as of a natural right, may be implied from a long and continuous *interruption* on the part of the servient owner *submitted to* by the dominant owner.[2]

It has been already pointed out that, under Act XV of 1877 or Act V of 1882, an easement cannot be acquired by *prescription* until there has been a suit between the contending parties. If there has been no such suit, and consequently no *acquisition* of an easement, no question of *abandonment* or *extinguishment* can arise.[3]

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[9] Goddard, 368, 373.

[10] Ward *v.* Ward, 7 Exch., 838; Gale, 625.

[1] Hurree Dass *v.* Jodoonath, 14 W. R., 79; 5 B. L. R., App., 66. But see note 7, p. 413, *supra.*

[2] On this subject, see also Marshall, 506; Juggutbundhoo *v.* Juggutchunder, 12 W. R., 519; and pp. 412, 413, *supra.*

[3] See Goddard, 372.

# Appendix.

## ACT No. XIV of 1859.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

*(Received the assent of the Governor-General on the 5th May 1859.)*

*An Act to provide for the Limitation of Suits.*

Preamble.

WHEREAS it is expedient to amend and consolidate the laws relating to the limitation of suits; It is enacted as follows:—

Limitation of suits.

I. No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say:—

Limitation of one year.
Pre-emption suits.

1. To suits to enforce the right of pre-emption, whether the same is founded on law or general usage or on special contract, the period of one year to be computed from the time at which the purchaser shall have taken possession under the sale impeached.

Limitation of one year.
Suits for damages, summary suits, &c.

2. To suits for pecuniary penalties or forfeitures for the breach of any law or regulation; to suits for damages for injury to the person and personal property, or to the reputation; to suits for damages for the infringement of copyright or of any

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exclusive privilege; to suits to recover the wages of servants, artizans, or laborers, the amount of tavern bills or bills for board and lodging or lodging only; and to summary suits before the Revenue Authorities under Regulation V, 1822, of the Madras Code—the period of one year from the time the cause of action arose.

Limitation of one year.
Suits to set aside sales under decrees or for arrears of Government revenue, &c.

3. To suits to set aside the sale of any property, moveable or immoveable, sold under an execution of a decree of any Civil Court not established by Royal Charter, when such suit is maintainable; to suits to set aside the sale of any property, moveable or immoveable, for arrears of Government Revenue or other demand recoverable in like manner; to suits by a Putneedar or the proprietor of any other intermediate tenure saleable for current arrears of rent, or other person claiming under him, to set aside the sale of any putnee talook or such other tenure sold for current arrears of rent; to suits to set aside the sale of any property, moveable or immoveable, sold in pursuance of any decree or order of a Collector or other Officer of Revenue—the period of one year from the date at which such sale was confirmed or would otherwise have become final and conclusive if no such suit had been brought.

Limitation of one year.
Suits to set aside attachments, &c., by Revenue Authorities for arrears of Government revenue.

4. To suits to set aside any attachment, lease, or transfer of any land or interest in land by the Revenue Authorities for arrears of Government revenue, or to recover any money paid under protest in satisfaction of any claim made by the Revenue Authorities, on account of arrears of revenue or demands recoverable as arrears of revenue—one year from the date of such attachment, lease, or transfer, or of such payment as the case may be.

Limitation of one year.
Suits to set aside summary decisions, &c.

5. To suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is maintainable—the period of one year from the date of the final decision, award, or order in the case.

6. To suits brought by any person to contest the justice of an award which shall have been made under Regulation VII, 1822, Regulation IX, 1825, and Regulation IX, 1833, of the Bengal Code, or to recover any property comprised in such award—the period of three years from the date of the final award or order in the case.

Limitation of three years.
Suits to contest certain awards.

7. To suits by any party bound by any order respecting the possession of property made under cl. 2, section 1, Act XVI of 1838, or Act IV of 1840, or any person claiming under such party, for the recovery of the property comprised in such order—the period of three years from the date of the final order in the case.

Limitation of three years.
Suits to recover property comprised in an order made under cl. 2. sec. 1, Act XVI of 1838, or Act IV of 1840.

*8. To suits to recover the hire of animals, vehicles, boats, or household furniture; or the amount of bills for any articles sold by retail; and to all suits for the rents of any buildings or lands (other than summary suits before the Revenue Authorities under Regulation V, 1822, of the Madras Code)—the period of three years from the time the cause of action arose.

Limitation of three years.
Suits for goods sold by retail, suits for rent of buildings or lands, &c.

9. To suits brought to recover money lent, or interest, or for the breach of any contract—the period of three years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent or interest or a contract in writing signed by the party to be bound thereby or by his duly authorized agent.

Limitation of three years.
Suits for money lent or interest or for breach of contract where no written contract exists.

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* That portion of clause 8 which relates to suits for the price of articles sold by retail, was postponed in its operation by Act XXXII of 1861, to the first July, 1862, and again by Act XIV of 1862, to the first January, 1865.

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Limitation of three years.
Suits for the same where there is a written contract which has not been registered within six months.

10. To suits brought to recover money lent, or interest, or for the breach of any contract in cases in which there is a written engagement or contract and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof—the period of three years from the time when the debt became due or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof.

Limitation of twelve years.
Suits for specialty-debts and legacies.

11. To suits in cases governed by English law upon all debts and obligations of record and specialties; and to suits for the recovery of any legacy—the period of twelve years from the time the cause of action arose.

Limitation of twelve years.
Suits for immoveable property.

12. To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.

Limitation of twelve years.
Suits for shares in joint family property and for maintenance.

13. To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate—the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is alleged to be a charge; or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share, or on account of such maintenance as the case may be.

Limitation of twelve years.
Suits by proprietor of land to resume or assess lakheraj, or rent-free land.

14. To suits by the proprietor of any land or by any person claiming under him, for the resumption or assessment of any lakheraj, or rent-free land—the period of twelve years from the time when the title of the person

claiming the right to resume and assess such lands, or of some person under whom he claims, first accrued. Provided that, in estates permanently settled, no such suit, although brought within twelve years from the time when the title of such person first accrued, shall be maintained if it is shown that the land has been held lakheraj, or rent-free, from the period of the Permanent Settlement.

Proviso, if the land has been held rent-free from the time of the Permanent Settlement.

15. To suits against a depositary, pawnee or mortgagee of any property, moveable or immoveable, for the recovery of the same—a period of thirty years if the property be moveable, and sixty years if it be immoveable, from the time of the deposit, pawn, or mortgage; or if in the meantime an acknowledgment of the title of the depositor, pawner, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee or mortgagee or some person claiming under him. from the date of such acknowledgment in writing.

Limitation of thirty and sixty years.

Suits against depositaries, pawnees, or mortgagees.

16. To all suits for which no other limitation is hereby expressly provided—the period of six years from the time the cause of action arose.

Limitation of six years applicable te all suits not especially provided for.

II. No suit against a trustee in his lifetime, and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time; but no suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding section, to be computed from the decease of such trustee: Provided that nothing herein contained shall prevent a co-trustee from enforcing, against the estate of a deceased trustee, any claim for contribution, if he shall institute a suit for that purpose within six years after such right of contribution shall have arisen.

Suits against trustees and their representatives for breach of trust, &c.

Proviso.

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Shorter periods of limitation, if prescribed by particular Acts, to prevail.

III. When, by any law now or hereafter to be in force, a shorter period of limitation than that prescribed by this Act is specially prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act.

Revival of right to sue by admission in writing.

IV. If, in respect of any legacy or debt, the person who, but for the law of limitation, would be liable to pay the same shall have admitted that such debt or legacy, or any part thereof, is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission: Provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

Proviso.

Computation of period of limitation in suits to recover property purchased from depositaries, pawnees, or mortgagees.

V. In suits for the recovery from the purchaser or any person claiming under him of any property purchased *bonâ fide* and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase: Provided that, in the case of purchase from a depositary, pawnee, or mortgagee, no such suit shall be maintained unless brought within the time limited by clause 15, section 1.

Proviso.

Computation of period of limitation in suits in Supreme Courts by mortgagee to recover immoveable property mortgaged.

VI. In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt.

Computation of period of limitation in suits to avoid incumbrances or under-tenures in estates sold for arrears of Government revenue.

VII. In suits to avoid incumbrances or under-tenures in an estate sold for arrears of Government revenue due from such estate, or in a putnee talook or other saleable tenure sold for arrears of rent, which, by virtue of such sale, becomes freed from incum-

brances and under-tenures, the cause of action shall be deemed to have arisen at the time when the sale of the estate, talook, or tenure became final and conclusive.

Computation of period of limitation in suits between merchants for balances of accounts current.

VIII. In suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts.

Computation of period of limitation in case of concealed fraud.

IX. If any person entitled to a right of action shall, by means of fraud, have been kept from the knowledge of his having such right or of the title upon which it is founded, or if any document necessary for establishing such right shall have been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessory thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be reckoned from the time when the fraud first became known to the person injuriously affected by it, or when he first had the means of producing or compelling the production of the concealed document.

Computation of period of limitation in suits where the cause of action is founded on fraud.

X. In suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged.

Computation of period of limitation in case of legal disability.

XI. If, at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to

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any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.

What persons to be deemed to be under legal disability.

XII. The following persons shall be deemed to be under legal disability within the meaning of the last preceding section—married women in cases to be decided by English law, minors, idiots, and lunatics.

Computation of period of limitation in case of absence of defendant.

XIII. In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories in India shall be excluded from such computation, unless service of a summons to appear and answer in the suit can, during the absence of such defendant, be made in any mode prescribed by law.

Computation of period of limitation in case of suit prosecuted *bonâ fide*, but in wrong Court.

XIV. In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal if any has been pending, shall be excluded from such computation.

Person dispossessed of immoveable property otherwise than by due course of law, may recover possession notwithstanding any title that may be set up.

* XV. If any person shall, without his consent, have been dispossessed of any immoveable property otherwise than by due course of law, such person, or any person claiming through him, shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof notwith-

* So much of section 15 as does not relate to the limitation of suits was left unrepealed by Act IX of 1871. This unrepealed portion was repealed and re-enacted by Act I of 1877.

standing any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this section shall bar the person from whom such possession shall have been so recovered, or any other person, instituting a suit to establish his title to such property and to recover possession thereof within the period limited by this Act.

Suit for dispossession to be brought within six months.

Suits to establish title not to be affected.

XVI. Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of any Court established by Royal Charter in refusing equitable relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act.

Act not to interfere with equitable jurisdiction of Supreme Courts.

*XVII. This Act shall not extend to any public property or right, nor to any suits for the recovery of the public revenue or for any public claim whatever, but such suits shall continue to be governed by the laws or rules of limitation now in force.

Act not to extend to public property, nor to suits for the recovery of public claims.

†XVIII. All suits that may be now pending, or that shall be instituted within the period of two years from the date of the passing of this Act, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted after the expiration of the said period shall be governed by this Act and no other law of limitation, any Statute, Act or Regulation now in force notwithstanding.

Act not to apply to suits now pending or to suits instituted within two years.

Suits afterwards instituted to be governed by this Act.

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* Bengal Regulation II of 1805, which applied to public claims, was repealed by Act VIII of 1868, without any reference to the terms of section 17, Act XIV of 1859.

† The operation of Act XIV of 1859 was further suspended by Act XI of 1861, until the first of January 1862.

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Proceedings for enforcing judgments, &c., of Supreme Courts to be taken within twelve years.

XIX. No proceeding shall be taken to enforce any judgment, decree, or order of any Court established by Royal Charter, but within twelve years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same, unless in the meantime such judgment, decree, or order shall have been duly revived, or some part of the principal money secured by such judgment, decree, or order, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in any such case no proceeding shall be brought to enforce the said judgment, decree, or order, but within twelve years after such revivor, payment, or acknowledgment, or the latest of such revivors, payments, or acknowledgments, as the case may be: Provided that, for three years next after the passing of this Act, every judgment, decree, and order which may be in force at the date of the passing of this Act shall be governed by the law now in force, anything therein contained notwithstanding.

Proviso as to judgments now in force.

Time for enforcing execution of judgment, &c., of a Civil Court not established by Royal Charter.

XX. No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.

Preceding section not to apply to judgments, &c., in force at the time of the passing of this Act.

XXI. Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within three years next after the passing of this Act, whichever shall first expire.

Time for execution of a summary award of Civil Court or Revenue Authority.

XXII. No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter or of any Revenue Authority

unless some proceeding shall have been taken to enforce such decision or award or to keep the same in force within one year next preceding the application for such execution.

Preceding section not to apply to summary awards in force at the passing of this Act.

XXIII.* Nothing in the preceding section shall apply to any summary decision or award in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within two years next after the passing of this Act, whichever shall first expire.

Operation of Act.

XXIV. This Act shall take effect throughout the Presidencies of Bengal, Madras, and Bombay, including the Presidency Towns and the Straits' Settlement; but shall not take effect in any Non-Regulation Province† or place until the same shall be extended thereto by public notification by the Governor-General in Council or by the Local Government to which such Province or place is subordinate. Whenever this Act shall be extended to any Non-Regulation Province or place by the Governor-General in Council, or by the Local Government to which such Province or place is subordinate, all suits which, within such Province or place, shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted within

Trial of pending suits, &c., in any Non-Regulation Province or place to which the Act is extended.

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* This section was repealed by Act XIV of 1870. The whole Act, except a portion of section 15, was repealed by Act IX of 1871. This last repeal did not affect suits instituted before the first day of April 1873, nor applications before or after decree in *such* suits. (11 C. L. R. 113, P. C.)

† Act XIV of 1859 was extended to Assam by a notification dated the 11th July 1860; to the districts of Cachar, Hazareebagh, Lohardugga and Beerbhoom, by a notification dated the 20th February 1861; to the Sonthal Pergunnahs, by a notification dated the 8th December 1862; to the Central Provinces, by a notification dated the 1st May 1863; and to the Punjab, by a notification dated the 26th December 1866. (Thompson, pp. 365, 366, second edition.)

Act XIV of 1859. such Province or place after the expiration of the said period, shall be governed by this Act and by no other law of limitation, any Statute, Act or Regulation now in force notwithstanding.

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# ACT No. IX OF 1871.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the 24th March* 1871.)

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*An Act for the Limitation of Suits and for other purposes.*

WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; And whereas it is also expedient to provide rules for acquiring ownership by possession; It is hereby enacted as follows:—

Preamble.

## PART I.

### PRELIMINARY.

Short title.

1. This Act may be called 'The Indian Limitation Act, 1871.'

Extent of Act.

It extends to the whole of British India; but nothing contained in sections two and three or in Parts II and III applies—

(*a*) to suits* instituted before the first day of April, 1873.

(*b*) to suits under the Indian Divorce Act.

(*c*) to suits under Madras Regulation VI of 1831.

Commencement.

This Act shall come into force on the first day of July 1871.

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* An application for the execution of a decree is an application in the suit in which the decree was obtained, and, as regards suits instituted before the 1st April 1873, all applications therein are excluded from the operation of the Act. Nothing in sec. 2, sec. 4 or sched. ii extends to an application for execution of a decree in a suit instituted before the 1st April 1873. *Mungul Pershad Dichit* v. *Grija Kant Lahiri*, 11 C. L. R., 113, P. C.

Repeal of enactments.

2. On and from that day the enactments mentioned in the first schedule hereto annexed shall be repealed to the extent specified in the third column of the same schedule.

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context—

'minor' means a person who has not completed his age of eighteen years:

'plaintiff' includes also any person through whom a plaintiff claims:

'nuisance' means any thing done to the hurt or annoyance of another's immoveable property and not amounting to a trespass:

'bill of exchange' includes also a hundi:

'trustee' does not include a benámídár, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrongdoer in possession without title:

'registered' means duly registered under the law for the registration of documents in force at the time and place of executing the document referred to in the context:

'foreign country' means any country other than British India;

and nothing shall be deemed to be done in 'good faith' which is not done with due care and attention.

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## PART II.

### LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

Dismissal of suits, &c., instituted, &c., after period of limitation.

4. Subject to the provisions contained in sections five to twenty-six (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

*Explanation.*—A suit is instituted in ordinary cases when the plaint is presented to the proper officer: in the case of a pauper, when his application for leave to sue as a pauper is filed; and in

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the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

*Illustrations.*

(*a.*) A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The Appellate Court must dismiss the suit.

(*b.*) An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

Proviso where Court is closed when period expires.

5. (*a.*) If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens :

Proviso as to appeals and applications for review.

(*b.*) Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period :

Different periods of limitation prescribed by local laws.

6. When, by any law not mentioned in the schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of limitation differing from that prescribed by this Act is especially prescribed for any suits, appeals or applications, nothing herein contained shall affect such law.

Appeals from decrees of High Courts on original side.

And nothing herein contained shall affect the periods of limitation prescribed for appeals from, or applications to review, any decree, order or judgment of a High Court in the exercise of its original jurisdiction.

*Legal Disability.*

Legal disability.

7. If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot,

he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual

affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When his disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

Nothing in this section shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which the suit must be brought.

*Illustrations.*

(*a.*) The right to sue for the hire of a boat accrues to A during his minority. He comes of age four years after the accrual of the right. He may institute his suit at any time within three years from the date of his coming of age.

(*b.*) A, to whom a right to sue for a legacy has accrued during his minority, attains full age eleven years after such right accrued. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his majority, within which he may bring his suit.

(*c.*) A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accrual of the right, A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased, within which to institute a suit. No extension of time will be given him under this section.

(*d.*) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accrual of the right, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time.

Disability of one joint creditor.

8. When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but where no such discharge can be given, time will not run as against any of them until they all are free from disability.

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Continuous running of time.

9. When once time has begun to run, no subsequent disability or inability to sue stops it:

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

Suits against express trustees and their representatives.

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time.

*Explanation.*—A purchaser in good faith for value from a trustee is not his representative within the meaning of this section.

Suits on foreign contracts.

11. Suits in British India on contracts entered into in a foreign country are subject to the rules prescribed by this Act.

Foreign limitation law.

12. No foreign rule of limitations shall be a defence to a suit in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule.

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## PART III.

### COMPUTATION OF PERIOD OF LIMITATION.

Exclusion of day on which right to sue accrues.

13. In computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded.

Exclusions in case of appeals and certain applications.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, an application to the High Court for the admission of a special appeal, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite

for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Exclusion of time of defendant's absence from British India.

14. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded, unless service of a summons to appear and answer in the suit can, during such absence, be made under the Code of Civil Procedure, section sixty.

Exclusion of time of suing *bonâ fide* in Court without jurisdiction.

15. In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another suit, whether in a Court of first instance or in a Court of appeal, against the same defendant or some person whom he represents, shall be excluded, where the last-mentioned suit is founded upon the same right to sue, and is instituted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to try it.

*Explanation* 1.—In excluding the time during which a former suit was pending, the day on which that suit was instituted, and the day on which the proceedings therein ended, shall both be counted.

*Explanation* 2.—A plaintiff resisting an appeal presented on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of this section.

Exclusion of time during which commencement of suit is stayed by injunction.

16. In computing the period of limitation prescribed for any suit, the commencement of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded.

Exclusion of time during which judgment-debtor sues to set aside execution sale.

17. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a suit to set aside the sale shall be excluded.

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Effect of death before right to sue accrues.

18. When a person who would, if he were living, have a right to sue, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative in interest of the deceased capable of suing.

When a person against whom, if he were living, a right to sue would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative whom the plaintiff may sue.

Nothing in the former part of this section applies to suits for the possession of land or of an hereditary office.

Effect of fraud.

19. When any person having a right to sue has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, and where any document necessary to establish such right has been fraudulently concealed,

the time limited for commencing a suit,

(*a*) against the person guilty of the fraud or accessory thereto, or

(*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

Effect of acknowledgment in writing.

20. (*a.*) No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent generally or specially authorized in this behalf.

(*b.*) When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

(*c.*) When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

*Explanation* 1.—For the purposes of this section, a promise or acknowledgment may be sufficient, though it omits to specify the exact amount of the debt or legacy, or avers that the time for payment or delivery has not yet come, or is accompanied by a refusal to pay or deliver, or is coupled with a claim to a set-off, or is addressed to any person other than the creditor or legatee;

but it must amount to an express undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.

*Explanation* 2.—Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.

*Illustrations.*

Z, a bond-debtor, himself writes a letter promising to pay the debt to his creditor A. Z affixes his seal, but does not sign the letter:

Z pays part of the debt and promises orally to pay the rest:

Z publishes an advertisement, requesting his creditors to bring in their claims for examination:

In none of these cases is the debt taken out of the operation of this Act.

Effect of payment of interest as such.

21. When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent generally or specially authorized in this behalf,

Effect of part-payment of principal.

or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent generally or specially authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part-payment of principal, the debt has arisen from a contract in writing, and the fact of the payment appears in the handwriting of the person making the same, on the instrument, or in his own books, or in the books of the creditor.

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Effect of substituting or adding new plaintiff or defendant.

22. When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have commenced when he was so made a party;

Proviso where original plaintiff dies.

Provided that, when a plaintiff dies, and the suit is continued by his representatives in interest, it shall, as regards them, be deemed to have commenced when it was instituted by the deceased plaintiff:

Proviso where original defendant dies.

Provided also, that, when a defendant dies, and the suit is continued against his representatives in interest, it shall, as regards them, be deemed to have been commenced when it was instituted against the deceased defendant.

Computation where there are successive breaches of contract.

Computation where the breach is continuing.

23. In the case of a suit for the breach of a contract, where there are successive breaches, a fresh right to sue arises, and a fresh period of limitation begins to run, upon every fresh breach; and where the breach is a continuing breach, a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the breach continues.

Nothing in the former part of this section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due.

*Illustrations.*

(*a.*) A contracts to pay an annuity to B for his life by quarterly instalments. A fails to pay any of the instalments. Here, upon every fresh failure, a fresh right to sue arises and a fresh period of limitation begins to run; and this Act may bar the remedy on the earlier breaches without affecting the remedy on the later breaches.

(*b.*) A, a tenant, covenants with B, his landlord, to keep certain buildings in repair. At every moment of the time during which the buildings continue out of repair and B retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

Continuing nusance.

24. In the case of a continuing nusance a fresh right to sue arises, and a fresh period of limitation begins to run at every moment of the time during which the nusance continues.

*Illustration.*

A diverts B's watercourse. At every moment of the time during which the diversion continues and B retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

Suit for compensation for act becoming unlawful.

25. In the case of a suit for compensation for an act lawful in itself, which becomes unlawful in case it causes damage, the period of limitation shall be computed from the time when damage accrues.

*Illustration.*

A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation runs from the time of the subsidence.

Computation of time mentioned in instruments.

26. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

*Illustrations.*

(*a.*) A Hindu makes a promissory note bearing a native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian calendar.

(*b.*) A Hindu makes a bond, bearing a native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiry of one year after date computed according to the Gregorian calendar.

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## PART IV.

### ACQUISITION OF OWNERSHIP BY POSSESSION.

Acquisition of right to easement.

27. Where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years, and where any way or watercourse, or the use of any water, or any other easement, whether affirmative or negative, has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

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the right to such access and use of light or air, way, water-course, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

*Explanation.*—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

*Illustrations.*

(*a.*) A suit is brought in 1871 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from 1st January 1850 to 1st January 1870. The plaintiff is entitled to judgment.

(*b.*) In a like suit also brought in 1871 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1848 to 1868. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(*c.*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

Exclusion in favour of reversioner of servient tenement.

28. Provided that, when any land or water upon, over or from which any easement (other than the access and use of light and air) has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof,

the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination

of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

*Illustration.*

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that, during ten of these years, C, a deceased Hindu widow, had a life-interest in the land; that, on C's death, B became entitled to the land; and that, within two years after C's death, he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Extinguishment of right to land or hereditary office.

29. At the determination of the period hereby limited to any person for instituting a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished.

## FIRST SCHEDULE.

(*See section* 2.)

| Number and year. | Subject or title. | Extent of repeal. |
|---|---|---|
| 21 Jac. I, cap. sixteen. | An Act for limitation of actions and for avoiding of suits in law. | The whole Statute, so far as it applies to British India. |
| 4 Ann., cap. sixteen. | An Act for the amendment of the law and the better advancement of justice. | Sections seventeen, eighteen and nineteen, so far as they apply to British India. |
| 33 Geo. III, cap. fifty-two. | An Act for continuing in the East India Company, for a further term, the possession of the British territories in India, together with their exclusive trade, under certain limitation; for establishing further regulations for the government of the said territories, and the better administration of justice within the | So much of section one hundred and sixty-two as relates to the limitation of civil suits in British India. |

FIRST SCHEDULE—(*continued*).

| Number and year. | Subject or title. | Extent of repeal. |
|---|---|---|
| | same; for appropriating to certain uses the revenues and profits of the said Company; and for making provision for the good order and government of the towns of Calcutta, Madras and Bombay. | |
| 53 Geo. III, cap. one hundred and fifty-five. | An Act for continuing in the East India Company, for a further term, the possession of the British territories in India, together with certain exclusive privileges; for establishing further regulations for the government of the said territories, and the better administration of justice within the same; and for regulating the trade to and from the places within the limits of the said Company. | Section one hundred and twenty-four, so far as it applies to British India. |
| 9 Geo. IV, cap. seventy-four. | Administration of criminal justice. | So much of section fifty-one as relates to civil suits. |
| 6 & 7 Vic., cap. ninety-four. | Foreign Jurisdiction Act ... | Section seven, so far as it applies to British India. |
| Act No. XIV of 1840. | An Act for rendering a written memorandum necessary to the validity of certain promises and engagements, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 9 Geo. IV, cap. 14. | From and including the words "Whereas by an Act" down to and including the words "Defendants against the Plaintiff." |
| Act No. XI of 1841. | Military Courts of Requests. | The proviso in section nine. |

FIRST SCHEDULE—(*continued*).

| Number and year. | Subject or title. | Extent of repeal. |
|---|---|---|
| Act No. XX of 1847. | Copyright Act ... ... | In section sixteen, the words 'actions, suits, bills.' |
| Act No. XII of 1855. | An Act to enable executors, administrators or representatives to sue and be sued for certain wrongs. | In section one, the words "and provided such action shall be brought within one year after the death of such person," and the words "and so as such action shall be commenced within two years after the committing of the wrong." |
| Act No. XIII of 1855. | Compensation for loss occasioned by death caused by actionable wrong. | In section two, the words "and that every such action shall be brought within twelve calendar months after the death of such deceased person." |
| Act No. XXV of 1857. | Forfeiture for mutiny ... | Section nine. |
| Act No. VIII of 1859. | The Code of Civil Procedure. | In section one hundred and nineteen, the words "within a reasonable time not exceeding thirty days after any process for enforcing the judgment has been executed," and the words "within thirty days from the date of the judgment." In section two hundred and thirty, the words "within one month |

FIRST SCHEDULE—(*continued*).

| Number and year. | Subject or title. | Extent of repeal. |
|---|---|---|
| | | from the date of such dispossession." The last twelve words of section two hundred and forty-six. In section two hundred and fifty-six, the words "At any time within thirty days from the date of the sale." In section two hundred and sixty-nine, the words "if made within one month from the date of such existence or obstruction, or of such dispossession, as the case may be." In section three hundred and twenty-four, the second sentence. In section three hundred and twenty-seven, the words "within six months from the date of the award." In section three hundred and thirty-three, from and including the words "within the period" down to the end of the section. In section three hundred and forty-seven, the words "within thirty days from the date of the dismissal." In section three hundred and seventy-three, the words |

FIRST SCHEDULE—(*continued*).



| Number and year. | Subject or title. | Extent of repeal. |
|---|---|---|
| | | "within the period prescribed for the presentation of a memorandum of appeal." So much of section three-hundred and seventy-seven as has not been repealed. |
| Act No. XIV of 1859. | An Act to provide for the limitation of suits. | The whole Act, except so much of section fifteen as does not relate to the limitation of suits. |
| Act No. IX of 1860. | Workmen and employers .. | So much of section two as relates to the limitation of suits. |
| Act No. XXXI of 1860. | Arms Act ... ... | So much of section forty-nine as relates to the limitation of suits. |
| Act No. V of 1861. | Mofussil Police ... | So much of section forty-two as relates to the limitation of suits. |
| Act No. XXIII of 1861. | Civil Procedure Code Amendment. | Section twelve. |
| Act No. XXV of 1861. | Criminal Procedure Code ... | Section four hundred and fifteen. |
| Act No. I of 1863. | Civil Courts in British Burma. | Section twenty-four. |
| Act No. VI of 1863. | Consolidated Customs Act | So much of section two hundred and fourteen as relates to the limitation of suits. |

FIRST SCHEDULE—(*continued*).

| Number and year. | Subject or title. | Extent or repeal. |
|---|---|---|
| Act No. XXIII of 1863. | Claims to waste lands ... | So much of section five as relates to the limitation of suits. |
| Act No. VII of 1865. | Government Forests Act ... | So much of section sixteen as relates to the limitation of suits. |
| Act No. XX of 1866. | Registration Act ... | Section fifty-one. |
| Act No. XIV of 1868. | Contagious Diseases Act ... | So much of section twenty-five as relates to the limitation of suits. |
| Act No. XX of 1869. | Volunteers ... ... | So much of section twenty-six as relates to the limitation of suits. |
| Act No. X of 1870. | Land Acquisition ... | So much of section fifty-eight as relates to the limitation of suits. |
| Act No. IV of 1871. | Coroners ... ... | In section forty-two, the words 'after the expiration of three months from such fact or failure, nor.' |
| Bombay Regulation V of 1827. | A Regulation defining the limitations as to time within which civil actions may be prosecuted, and containing rules of judication respecting written acknowledgments of debts executed without receipt of a full consideration; also regarding interest, the tendering payment of debts, and the disposal of property mortgaged or pledged. | Chapter one. |

## SECOND SCHEDULE.

(*See section* 4.)

FIRST DIVISION: SUITS.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part I.* *Thirty days.* | |
| 1.—To contest an award of the Board of Revenue under Act No XXIII of 1863 (*to provide for the adjudication of claims to waste lands*). | Thirty days ... | When notice of the award is delivered to the plaintiff. |
| | *Part II* *Ninety days.* | |
| 2.—For doing, or for omitting to do, an act in pursuance of any enactment in force for the time being in British India. | Ninety days ... | When the act or omission took place. |
| | *Part III.* *Six months.* | |
| 3.—Under Act No. XIV of 1859 (*to provide for the limitation of suits*), section fifteen, to recover possession of immoveable property. | Six months ... | When the dispossession occurs. |
| 4.—Under Act No. IX of 1860 (*to provide for the speedy determination of certain disputes between workmen engaged in Railway and other public works and their employers*), section one. | Ditto ... | When the wages, hire, or price of work claimed accrued due. |
| 5.—Under Act No. V of 1866 (*to provide a summary procedure on bills of exchange, and to amend, in certain respects, the commercial law of British India*). | Ditto ... | When the bill or promissory note becomes due and payable. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part IV. One year.* | |
| 6.—Upon a Statute, Act, Regulation, or Bye-law, for a penalty or forfeiture. | One year .. | When the penalty or forfeiture is incurred. |
| 7.—For the wages of a domestic servant, artisan or labourer not provided for by this schedule, No. 4. | Ditto ... | When the wages sued for accrue due. |
| 8.—For the price of food or drink sold by the keeper of a hotel, tavern or lodging house. | Ditto ... | When the food or drink is delivered. |
| 9.—For the price of lodging. | Ditto ... | When the lodging ends. |
| 10.—To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract. | Ditto ... | When the purchaser takes actual possession under the sale sought to be impeached. |
| 11.—For damages for infringing copy-right or any other exclusive privilege. | Ditto ... | The date of the infringement. |
| 12.—By executors, administrators or representatives under Act No. XII of 1855 (*to enable executors, administrators or representatives to sue and be sued for certain wrongs*). | Ditto ... | The date of the death of the person wronged. |
| 13.—By executors, administrators or representatives under Act No. XIII of 1855 (*to provide compensations to families for loss occasioned by the death of a person caused by actionable wrong*). | Ditto ... | The date of the death of the person killed. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part IV.* *One year.* | |
| 14.—To set aside any of the following sales :— (*a*) sale in execution of a decree of a Civil Court ; (*b*) sale in pursuance of a decree or order of a Collector or other officer of revenue ; (*c*) sale for arrears of Government revenue or for any demand recoverable as such arrears ; (*d*) sale of a patní táluq sold for current arrears of rent. *Explanation.*—In this clause 'patní' includes any intermediate tenure saleable for current arrears of rent. | One year ... | When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought. |
| 15.—To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit. | Ditto ... | The date of the final decision or order in the case by a Court competent to determine it finally. |
| 16.—To set aside any act of an officer of Government in his official capacity, not herein otherwise expressly provided for. | Ditto ... | The date of the act. |
| 17.—Against Government to set aside any attachment, lease or transfer of immoveable property by the Revenue Authorities for arrears of Government revenue. | Ditto ... | When the attachment, lease or transfer is made. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part IV.* *One year.* | |
| 18.—Against Government to recover money paid under protest in satisfaction of a claim made by the Revenue Authorities on account of arrears of revenue or on account of demands recoverable as such arrears. | One year ... | When the payment is made. |
| 19.—Against Government for compensation for land acquired for public purposes. | Ditto ... | The date of determining the amount of the compensation. |
| 20.—Like suit for compensation when the acquisition is not completed. | Ditto ... | The date of the refusal to complete. |
| 21.—For false imprisonment. | Ditto ... | When the imprisonment ends. |
| 22.—For any other injury to the person. | Ditto ... | When the injury is committed. |
| 23.—For a malicious prosecution. | Ditto ... | When the plaintiff is acquitted. |
| 24.—For libel ... ... | Ditto ... | When the libel is published. |
| 25.—For slander ... ... | Ditto ... | When the words are spoken. |
| 26.—For taking or damaging moveable property. | Ditto ... | When the taking or damage occurs. |
| 27.—For loss of service occasioned by the seduction of the plaintiff's servant or daughter. | Ditto ... | When the loss occurs. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part IV.* *One year.* | |
| 28.—For inducing a person to break a contract with the plaintiff. | One year ... | The date of the breach. |
| 29.—For an illegal, irregular or excessive distress. | Ditto ... | The date of the distress. |
| 30.—For wrongful seizure of moveable property under legal process. | Ditto ... | The date of the seizure. |
| | *Part V.* *Two years.* | |
| 31.—For obstructing a way or a watercourse. | Two years ... | The date of the obstruction. |
| 32.—For diverting a watercourse. | Ditto ... | The date of the diversion. |
| 33.—For wrongfully detaining title-deeds. | Ditto ... | When the title to the property comprised in the deeds is adjudged to the plaintiff, or the detainer's possession otherwise becomes unlawful. |
| 34.—For wrongfully detaining any other moveable property. | Ditto ... | When the detainer's possession becomes unlawful. |
| 35.—For specific recovery of moveable property in cases not provided for by this schedule, numbers 48 and 49. | Ditto ... | When the property is demanded and refused. |
| 36.—Against a carrier for losing or injuring goods. | Ditto ... | When the loss or injury occurs. |
| 37.—Against a carrier for delay in delivering goods. | Ditto ... | When the goods ought to be delivered. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part V.* *Two years.* | |
| 38.—Against one who, having a right to use property for specific purposes, perverts it to other purposes. | Two years ... | The time of the perversion. |
| 39.—Under Act No. XII of 1855 (*to enable executors, administrators or representatives to sue and be sued for certain wrongs*) against an executor, administrator or other representative. | Ditto ... | When the wrong complained of is done. |
| 40.—For compensation for any wrong, malfeasance, nonfeasance, or misfeasance, independent of contract and not herein specially provided for. | Ditto ... | When the wrong is done or the default happens. |
| 41.—For the recovery of a wife. | Ditto ... | When possession is demanded and refused. |
| 42.—For the restitution of conjugal rights. | Ditto ... | When restitution is demanded and refused. |
| | *Part VI.* *Three years.* | |
| 43.—For trespass upon immoveable property. | Three years ... | When the trespass takes place. |
| 44.—To contest an award under any of the following Regulations of the Bengal Code:— VII of 1822, IX of 1825, and IX of 1833. | Ditto ... | The date of the final award or order in the case. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VI.* *Three years.* | |
| 45.—By a party bound by such award to recover any property comprised therein. | Three years ... | The date of the final award or order in the case. |
| 46.—By any person bound by an order respecting the possession of property made under Act No. XVI of 1838, section one, clause two, or Act No. XXV of 1861, chapter twenty-two, or Bombay Act No. V of 1864, or by any one claiming under such person, to recover the property comprised in such order. | Ditto ... | The date of the final order in the case. |
| 47.—For lost moveable property not dishonestly misappropriated or converted. | Ditto ... | When the property is demanded and refused. |
| 48.—For moveable property acquired by theft, extortion, cheating, or dishonest misappropriation or conversion. | Ditto ... | Ditto. |
| 49.—For the hire of animals, vehicles, boats or household furniture. | Ditto ... | When the hire becomes payable. |
| 50.—For the balance of money advanced in payment of goods to be delivered. | Ditto ... | When the goods ought to be delivered. |
| 51.—For the price of goods sold and delivered, where no fixed period of credit is agreed upon. | Ditto ... | The date of the delivery of the goods. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VI. Three years.* | |
| 52.—For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit. | Three years ... | The expiry of the period of credit. |
| 53.—For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given. | Ditto ... | When the period of the proposed bill elapses. |
| 54.—For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon. | Ditto ... | The date of the sale. |
| 55.—For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment. | Ditto ... | When the work is done. |
| 56.—For money payable for money lent. | Ditto ... | When the loan is made. |
| 57.—Like suit when the lender has given a cheque for the money. | Ditto .. | When the cheque is paid. |
| 58.—For money lent under an agreement that it shall be payable on demand. | Ditto ... | When the demand is made. |
| 59.—For money payable to the plaintiff for money paid for the defendant. | Ditto ... | When the money is paid. |
| 60.—For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. | Ditto ... | When the money is received. |

SECOND SCHEDULE—(*continued*).



FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VI*<br>*Three years.* | |
| 61.—For money payable for interest upon money due from the defendant to the plaintiff. | Three years ... | When the interest becomes due. |
| 62.—For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. | Ditto ... | When the accounts are stated, unless where the debt is made payable at a future time and then when that time arrives. |
| 63.—Upon a promise to do anything at a specified time, or upon the happening of a specified contingency. | Ditto ... | At the time specified or upon the contingency happening. |
| 64.—Against a factor for an account. | Ditto ... | When the account is demanded, or where no such demand is made, when the agency terminates. |
| 65.—On a single bond where a day is specified for payment. | Ditto .. | The day so specified. |
| 66.—On a single bond where no such day is specified. | Ditto ... | The date of executing the bond. |
| 67.—On a bond subject to a condition. | Ditto . | When the condition is broken. |
| 68.—On a bill of exchange or promissory-note payable at a fixed time after date. | Ditto ... | When the bill or note falls due. |
| 69.—On a bill of exchange payable at or after sight. | Ditto ... | When the bill is presented. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VI. Three years.* | |
| 70.—On a bill of exchange accepted payable at a particular place. | Three years ... | When the bill is presented at that place. |
| 71.—On a bill of exchange or promissory note payable at a fixed time after sight or after demand. | Ditto .. | When the fixed time expires. |
| 72.—On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue. | Ditto ... | When the demand is made. |
| 73.—By the endorsee of a bill or promissory note against the endorser. | Ditto ... | The date of the endorsement. |
| 74.—On a promissory note or bond payable by instalments.. | Ditto ... | The expiration of the first term of payment, as to the part then payable; and, for the other parts, the expiration of the respective terms of payment. |
| 75.—On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one instalment, the whole shall be due. | Ditto ... | The time of the first default, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made. |
| 76.—On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen. | Ditto ... | The time of the delivery to the payee. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VI. Three years.* | |
| 77.—On a dishonoured foreign bill where protest has been made and notice given. | Three years .. | When the notice is given. |
| 78.—By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance. | Ditto ... | The date of the refusal to accept. |
| 79.—Like suit when the bill has been dishonoured by non-acceptance and afterwards by non-payment. | Ditto ... | Ditto. |
| 80.—Suit on a bill of exchange or promissory note not herein expressly provided for. | Ditto ... | When the bill or note becomes payable. |
| 81.—By the acceptor of an accommodation bill against the drawer. | Ditto ... | When the acceptor pays the amount. |
| 82.—By a surety against the principal debtor. | Ditto ... | When the surety pays the creditor. |
| 83.—By a surety against co-surety. | Ditto ... | When the plaintiff pays anything in excess of his own share. |
| 84.—Upon any other contract to indemnify. | Ditto ... | When the plaintiff is actually damnified. |
| 85.—By an attorney or vakíl for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid. | Ditto ... | The termination of the suit or business, or (where the attorney or vakíl properly discontinues the suit or business) the date of such discontinuance. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VI. Three years.* | |
| 86.—For compensation for damage caused by an injunction wrongfully obtained. | Three years ... | When the injunction ceases. |
| 87.—For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties. | Ditto ... | The time of the last item admitted or proved in the account. |
| 88.—On a policy of insurance when the sum assured is payable after proof of the death or loss has been given to or received by the insurers. | Ditto ... | When proof of the death or loss is given or received, to or by the insurers, whether by or from the plaintiff, or any other person. |
| 89.—By the assured to recover premia paid under a policy voidable at the election of the insurers. | Ditto ... | When the insurers elect to avoid the policy. |
| 90.—By a principal against his agent for moveable property received by the latter and not accounted for. | Ditto ... | When the account is demanded and refused. |
| 91.—Other suits by principals against agents for neglect or misconduct. | Ditto ... | When the neglect or misconduct occurs. |
| 92.—To cancel or set aside an instrument not otherwise provided for. | Ditto ... | When the instrument is executed. |
| 93.—To declare the forgery of an instrument issued, or registered, or attempted to be enforced. | Ditto ... | The date of the issue, registration, or attempt. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VI. Three years.* | |
| 94.—For property which the plaintiff has conveyed while insane. | Three years ... | When the plaintiff is restored to sanity and has knowledge of the conveyance. |
| 95.—For relief on the ground of fraud. | Ditto ... | When the fraud becomes known to the party wronged. |
| 96.—To set aside a decree obtained by fraud. | Ditto ... | Ditto. |
| 97.—For relief on the ground of mistake in fact. | Ditto ... | When the mistake becomes known to the plaintiff. |
| 98.—For money paid upon an existing consideration which afterwards fails. | Ditto ... | The date of the failure. |
| 99.—To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust. | Ditto ... | The date of the trustee's death, or, if the loss has not then been occasioned, the date of the loss. |
| 100.—For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers. | Ditto ... | The date of the plaintiff's advance in excess of his own share. |
| 101.—By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution. | Ditto ... | When the right to contribution accrues. |
| 102.—For a seaman's wages. | Ditto ... | The end of the voyage during which the wages are earned. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VI.* *Three years.* | |
| 103.—By a Muhammadan for exigible dower (*mu'ajjal*). | Three years ... | When the dower is demanded and refused, or (where during the continuance of the marriage no such demand has been made) when the marriage is dissolved by death or divorce. |
| 104.—By a Muhammadan for deferred dower (*mu'wajjal*). | Ditto ... | When the marriage is dissolved by death or divorce. |
| 105.—By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee. | Ditto ... | The date of the receipt. |
| 106.—For an account and a share of the profits of a dissolved partnership. | Ditto ... | The date of the dissolution. |
| 107.—By a Hindú manager of a joint estate for contribution in respect of a payment made by him on account of the estate. | Ditto ... | The date of the payment. |
| 108.—By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease. | Ditto ... | When the trees are cut down. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VI.* *Three years.* | |
| 109.—For the profits of immoveable property belonging to the plaintiff wrongfully received by the defendant. | Three years ... | When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, the date of the decree of the Appellate Court. |
| 110.—For arrears of rent ... | Ditto ... | When the arrears become due. |
| 111.—By a vendor of immoveable property to enforce his lien for unpaid purchase-money. | Ditto ... | The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance. |
| 112.—For a call by a company registered under any Statute or Act. | Ditto ... | When the call is made. |
| 113.—For specific performance of a contract. | Ditto ... | When the plaintiff has notice that his right is denied. |
| 114.—For the rescission of a contract. | Ditto ... | When the contract is executed by the plaintiff. |
| 115.—For the breach of any contract, express or implied, not in writing registered, and not herein specially provided for. | Ditto ... | When the contract is broken, or (where there are successive breaches) when the breach sued for occurs, or (where the breach is continuing) when it ceases. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VII. Six years.* | |
| 116.—Upon a judgment obtained in a foreign country. | Six years ... | The date of the judgment. |
| 117.—On a promise or contract in writing registered. | Ditto ... | When the period of limitation would begin to run against a suit brought on a similar promise or contract not registered. |
| 118.—Suit for which no period of limitation is provided elsewhere in this schedule. | Ditto ... | When the right to sue accrues. |
| | *Part VIII. Twelve years.* | |
| 119.—By an auction-purchaser or any one claiming under him to avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, the estate being, by virtue of such sale, freed from incumbrances and under-tenures. | Twelve years ... | When the sale becomes final and conclusive. |
| 120.—To avoid incumbrances of under-tenures in a *patní taluq* or other saleable tenures sold for arrears of rent, the taluq or tenure being, by virtue of such sale, freed from incumbrances and under-tenures. | Ditto ... | When the sale becomes final and conclusive. |
| 121.—Upon a judgment obtained in British India, or a recognizance. | Ditto ... | The date of the judgment or recognizance. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VIII. Twelve years.* | |
| 122.—For a legacy or for a distributive share of the moveable property of a testator or intestate. | Twelve years ... | When the legacy or share becomes payable or deliverable. |
| 123.—For possession of an hereditary office. | Ditto ... | When the defendant, or some person through whom he claims, took possession of the office adversely to the plaintiff.<br><br>*Explanation.*—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed. |
| 124.—Suit, during the life of a Hindú widow by a Hindú entitled to the possession of land on her death, to have an alienation made by the widow declared to be void except for her life. | Ditto ... | The date of the alienation. |
| 125.—By a Hindú governed by the law of the Mitákshará to set aside his father's alienation of ancestral property. | Ditto ... | The date of the alienation. |
| 126.—Like suit by a Hindú governed by the law of the Dáyabhága. | Ditto ... | When the father dies. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VIII. Twelve years.* | |
| 127.—By a Hindú excluded from joint family property to enforce a right to share therein. | Twelve years ... | When the plaintiff claims and is refused his share. |
| 128.—By a Hindú for maintenance. | Ditto ... | When the maintenance sued for is claimed and refused. |
| 129.—To establish or set aside an adoption. | Ditto ... | The date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father. |
| 130.—For the resumption or assessment of rent-free land. | Ditto ... | When the right to resume or assess the land first accrued. Provided that no such suit shall be maintained where the land forms part of a permanently-settled estate, and has been held rent-free from the time of the Permanent Settlement. |
| 131.—To establish a periodically recurring right. | Ditto ... | When the plaintiff is first refused the enjoyment of the right. |
| 132.—For money charged upon immoveable property. *Explanation.*—The allowance and fees called *málikána* and *haqqs* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property. | Ditto ... | When the money sued for becomes due. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VIII.* *Twelve years.* | |
| 133.—To recover moveable property conveyed in trust, deposited or pawned and afterwards bought from the trustee, depositary or pawnee, in good faith and for value. | Twelve years ... | The date of the purchase. |
| 134.—To recover possession of immoveable property conveyed in trust or mortgaged and afterwards purchased from the trustee or mortgagee in good faith and for value. | Ditto ... | The date of the purchase. |
| 135.—Suit instituted in a Court, not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged. | Ditto ... | When the mortgagee is first entitled to possession. |
| 136.—By a purchaser at a private sale for possession of immoveable property sold, when the vendor was out of possession at the date of the sale. | Ditto .. | When the vendor is first entitled to possession. |
| 137.—Like suit by a purchaser at a sale in execution of a decree, when the execution-debtor was out of possession at the date of the sale. | Ditto ... | When the execution-debtor is first entitled to possession. |
| 138.—By a purchaser of land at a sale in execution of a decree for possession of the purchased land, when he never has had possession. | Ditto ... | The date of the sale. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VIII. Twelve years.* | |
| 139.—Like suit when the purchaser had possession, but was afterwards dispossessed. | Twelve years ... | The date of the dispossession. |
| 140.—By a landlord to recover possession from a tenant. | Ditto ... | When the tenancy is determined. |
| 141.—By a remainderman, a reversioner (other than a landlord), or a devisee, for possession of immoveable property. | Ditto ... | When his estate falls into possession. |
| 142.—Like suit by a Hindú entitled to the possession of immoveable property on the death of a Hindú widow. | Ditto ... | When the widow dies. |
| 143.—For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession. | Ditto ... | The date of the dispossession or discontinuance. |
| 144.—Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition. | Ditto ... | When the forfeiture was incurred or the condition broken. |
| 145.—For possession of immoveable property or any interest therein not hereby otherwise specially provided for. | Ditto ... | When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff. |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part VIII. Twelve years.* | |
| 146.—For a declaration of right to an easement. | Twelve years ... | When the easement ceased to be enjoyed by the plaintiff, or the persons on whose behalf he sues. |
| | *Part IX. Thirty years.* | |
| 147.—Against a depositary or pawnee to recover moveable property deposited or pawned. | Thirty years ... | The date of the deposit or pawn, unless where an acknowledgment of the title of the depositor or pawnor, or of his right of redemption, has before the expiration of the prescribed period been made in writing, signed by the depositary, or pawnee, or some person claiming under him, and, in such case, the date of the acknowledgment. |
| | *Part X. Sixty years.* | |
| 148.—Against a mortgagee to recover possession of immoveable property mortgaged. | Sixty years ... | The date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been |

SECOND SCHEDULE—(*continued*).

FIRST DIVISION: SUITS—continued.

| Description of suit. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | *Part X.* *Sixty years.* | |
| | | made in writing signed by the mortgagee or some person claiming under him, and, in such case, the date of the acknowledgment. Provided that all claims to redeem, arising under instruments of mortgage of immoveable property situate in British Burma, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that Province immediately before the same day. |
| 149.—Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged. | Sixty years ... | When any part of the principal or interest was last paid on account of the mortgage-debt. |
| 150.—Any suit in the name of the Secretary of State for India in Council. | Ditto ... | When the right to sue accrued. |

## SECOND SCHEDULE—(*continued*).

### SECOND DIVISION: APPEALS.

| Description of appeal. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| 151.—Under the Code of Civil Procedure to the Court of a District Judge. | Thirty days ... | The date of the decree appealed against. |
| 152.—Under the Code of Criminal Procedure to any Court other than the High Court. | Ditto ... | The date of the sentence or order appealed against. |
| 153.—Under the same Code to the High Court. | Sixty days ... | Ditto. |
| 154.—Under the Code of Civil Procedure to the High Court. | Ninety days ... | The date of the decree appealed against. |

### THIRD DIVISION: APPLICATIONS.

| Description of application. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| 155.—Under the Code of Civil Procedure to set aside an award. | Ten days ... | When the award is submitted to the Court, and notice of the submission has been given to the persons and in manner prescribed by the High Court. |
| 156.—By a plaintiff for an order to set aside a judgment by default. | Thirty days ... | The date of the judgment. |
| 157.—By a defendant for an order to set aside a judgment *ex parte*. | Ditto ... | The date of executing any process for enforcing the judgment. |
| 158.—Under the Code of Civil Procedure, by a person dispossessed of immoveable property, and disputing the right of the decree-holder to be put into possession. | Ditto ... | The date of the dispossession. |

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## SECOND SCHEDULE—(*continued*).

THIRD DIVISION: APPLICATIONS—continued.

| Description of application. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| 159.—To set aside a sale in execution of a decree, on the ground of irregularity in publishing or conducting the sale. | Thirty days ... | The date of the sale. |
| 160.—Complaining of resistance or obstruction to delivery of possession of immoveable property sold in execution of a decree, or of dispossession in the delivery of possession to the purchaser of such property. | Ditto ... | The date of the resistance, obstruction, or dispossession. |
| 161.—For re-admission of an appeal dismissed for want of prosecution. | Ditto ... | The date of the dismissal. |
| 162.—For leave to appeal as a pauper. | Ninety days ... | The date of the decree appealed against. |
| 163.—To a High Court for the admission of a special appeal. | Ditto ... | Ditto. |
| 164.—For a review of judgment. | Ditto ... | The date of the decree. |
| 165.—Under the Code of Civil Procedure, section three-hundred-and-twenty-seven, that an award be filed in Court. | Six months ... | The date of the award. |
| 166.—For the execution of a decision (other than a decree or order passed in a regular suit or an appeal) of a Civil Court or of a Revenue Court. | One year ... | The date of the decision or of taking some proceeding to enforce or keep in force the decision. |

SECOND SCHEDULE—(*continued*).

THIRD DIVISION: APPLICATIONS—continued.

| Description of application. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| 167.—For the execution of a decree or order of any Civil Court not provided for by No. 169. | Three years ... | The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review, or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the decree or order, or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, section two-hundred-and-sixteen, or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified. |
| 168.—For the execution of any such decree or order of which a certified copy has been registered under the Indian Registration Act. | Six years ... | The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, |

SECOND SCHEDULE—(*continued*).

THIRD DIVISION: APPLICATIONS—continued.

| Description of application. | Period of limitation. | Time when period begins to run. |
|---|---|---|
| | | or (where there has been a review of judgment) the date of the decision passed on the review. |
| 169.—To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction. | Twelve years ... | When a present right to enforce the judgment, decree or order accrued to some person capable of releasing the right: Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments or acknowledgments, as the case may be. |

# ACT No. XV OF 1877.



*As amended by Acts No. XII of* 1879, *No. VIII of* 1880, *and No. V of* 1881.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Act No. XV of* 1877 *received the assent of the Governor General on the* 19*th of July*, 1877 ; *Act No. XII of* 1879 *received the assent of the Governor General on the* 29*th of July*, 1879 ; *Act No. VIII of* 1880 *received the assent of the Governor General on the* 12*th March*, 1880 ; *and Act No. V of* 1881 *received the assent of the Governor General on the* 21*st of January*, 1881.)

*An Act for the Limitation of Suits, and for other purposes.* Title.

Act XIV of 1859, which provided periods of limitation in the case of *applications* for execution of decrees and orders, as well as periods for the limitation of *suits* in the ordinary acceptation of the word, was described merely as "an Act to provide for the limitation of suits." (See *Hurro* v. *Shoorodhonee*, 9 W. R., 402, 404.) In Act XV, *suit* does not include an appeal or an application. (See sec. 3 ; p. 277, note 5, *supra*.) The words "and for *other* purposes" refer to the limitation of appeals and applications, and to the rules relating to *prescription* in secs. 26 to 28.

WHEREAS it is expedient to amend the law relating to the limitation of suits, appeals and certain applications to Courts ; and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property ; It is hereby enacted as follows :— Preamble.

Preamble.

Act XIV of 1859 and Act IX of 1871 recited the expediency of amending and *consolidating* the law of limitation. The work of consolidation having been effected by those Acts, the main object of Act XV is to *amend* the law of limitation.

"*Certain* applications to *Courts*."—Not applications to arbitrators and heads of offices, nor *all* applications to Courts. (See pp. 231 and 232, *supra*.) Rules for the acquisition of an absolute and indefeasible right to easements, by *quasi*-possession or enjoyment, are here described as "rules for acquiring by possession the ownership of easements." (See secs. 26 and 27, and Lecture XII.)

No express rules have been laid down by the Act "for *acquiring* by *possession* the ownership of other property."

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But the preamble evidently refers to the rule in sec. 28, under which the right to property is *extinguished* by the *absence of possession*, and *virtually* conveyed to the party in possession. The Legislature, here, clearly shews what it understands to be the *effect* of the extinguishment of right under sec. 28. (See pp. 4, 5, 336, and 337, *supra*.)

"Easements and other property."—An easement, however, is rather a fringe to property than property itself. (See Lecture XII.) In sec. 28, the word "property" is used in its ordinary sense, and does *not* include "easements."

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## PART I.

### PRELIMINARY.

Sec. 1. Short title.

1. This Act may be called "The Indian Limitation Act, 1877:"

Extent of Act.

It extends to the whole of British India; but nothing contained in sections two and three or in Parts II and III applies—

(*a*) to suits under the Indian Divorce Act, or

(*b*) to suits under Madras Regulation VI of 1831;

Commencement.

and it shall come into force on the first day of October, 1877.

"Whole of British India."—Compare sec. 1 of Act XIV of 1882, and sec. 24, Act XIV of 1859. Act XV of 1877 applies to the non-regulation or scheduled districts. (See p. 230, *supra*.)

"Suits under the Indian Divorce Act."—See pp. 193, 231, *supra*.

The Indian Divorce Act (IV of 1869) relates to persons professing the *Christian* religion. It also applies to marriages contracted under Act III of 1872. Unreasonable delay in presenting or prosecuting a petition for dissolution of marriage is, under the Divorce Act, a ground for disallowing the petition.

Suits by *Mahomedans* or *Hindus* for a decree for nullity of marriage or for restitution of conjugal rights *are* governed by Act XV of 1877.

Madras Regulation VI of 1831 is a Regulation to prevent the misappropriation of emoluments annexed by the State to hereditary village and other officers in the Revenue and Police Departments, and to maintain the due efficiency of those offices. Claims to such offices or to any of the emoluments annexed thereto are cognizable by the Revenue authorities. (See 4 Mad., 70.)

As to the commencement of the Act, see p. 229, *supra*.

Applications, in suits or execution-proceedings *pending* on the 1st October 1877, are governed by the old law. (See *Jogomohun* v. *Luchmesshur*, I. L. R., 10 Calc., 748, and pp. 201, 209, and 210, *supra*.)

2. On and from that day, the Acts mentioned in the first schedule hereto annexed shall be repealed to the extent therein specified.

Repeal of Acts.

[On the effect of repeal of Acts, see Lecture VII, and p. 237, note (6), *supra*.]

But all references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed; and nothing herein contained shall be deemed to affect the Indian Contract Act, section 25.

References to Act IX of 1871.

Saving of titles already acquired. Saving of Act IX of 1872, s. 25.

"Any *title* acquired."—A *right to sue*, not barred by Act IX of 1871, is not a *title* acquired under that Act (*Thakarya* v. *Sheo*, I. L. R., 2 All., 872). Title *to property* indirectly acquired under sec. 29 of Act IX of 1871, or under Act XIV of 1859, is "title acquired." See *Zulfikar* v. *Manna*, I. L. R., 3 All., 48.

"Any right to *sue* barred."—A right to institute a suit or to *apply* for execution of a decree is a right to *sue*. "Suit" is defined by sec. 3. But to "sue" is nowhere defined. "Right to sue" includes the right to make an application invoking the aid of the Court for the purpose of satisfying a demand (*Nursing* v. *Harihar*, I. L. R., 5 Calc., 897). A right to sue, which accrued when Act IX of 1871 was in force, but which was *not barred* on the 1st October 1877, is governed by the provisions of Act XV of 1877. (See p. 229, *supra*.) Applications for execution of decrees in suits instituted before the 1st April 1873, when they are applications in a proceeding commenced before the 1st October 1877, and *pending* on that date, are governed by Act XIV of 1859. Applications for execution of decrees in suits instituted on or *after* the 1st April 1873, and before the 1st of October 1877, when such applications are made in a proceeding *pending* on the 1st October 1877, are governed by Act IX of 1871. *New* applications made on or after 1st October 1877, although the suits from which such applications arise may have been previously instituted, are governed by Act XV of 1877. (See *Mungul Pershad* v. *Grija Kant*, I. L. R., 8 Calc., 51, P. C.; *Juggomohun* v. *Luchmessur*, I. L. R., 10 Calc., 748. See also I. L. R., 1 Mad., 52; I. L. R., 7 Bomb., 459; and pp. 209, 210, *supra*.)

Titles fully acquired, and rights to sue completely barred, are saved from the retrospective operation of Act XV. (See pp. 200, 205, 206 and 229, *supra*.)

Saving of sec. 25 of the Contract Act. A written *acknowledgment* of a debt in order to be effectual under sec. 19, must be signed *before* the expiry of the prescribed period of limitation. Notwithstand-

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ing this provision, a written *promise* to pay a debt, signed *after* the expiry of such period, is valid under sec. 25, cl. 3, of the Contract Act. (See *Raghoji* v. *Abdool*, I. L. R., 1 Bomb., 590 ; *Chatur v. Tulsi*, I. L. R., 2 Bomb., 230 ; and p. 276, *supra.*) This is declaratory of the old law on the subject (*Heeralal* v. *Dhunput*, I. L. R., 4 Calc., 500).

Sec. 2, para. 3.

Suits for which period prescribed by this Act is shorter than that prescribed by Act IX of 1871.

Notwithstanding anything herein contained, any suit mentioned in No. 146 of the second schedule hereto annexed may be brought within five years next after the said first day of October 1877, unless where the period prescribed for such suit by the said Indian Limitation Act, 1871, shall have expired before the completion of the said five years ; and any other suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the said Indian Limitation Act, 1871, may be brought within two years next after the said first day of October 1877, unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years.

Temporary suspension of the Act, as regards suits for which the period of limitation prescribed by Act IX of 1871 was reduced—

The Act was passed on the 19th July 1877, but it did not come into operation for two months and twelve days from that date. In respect of suits mentioned in No. 146 (for which the period of limitation was reduced by thirty years), the Act came into operation on the 1st October 1882 , and as regards other suits for which the period was reduced, the Act came into operation on the 1st October 1879. So far as these *exceptional suits* are concerned, the Act did *not* come into force on the 1st of October 1877. (See p. 229, *supra.*)

The expression " the period of limitation prescribed " occurs in sec. 2 and sec. 4. These words refer to the entries in columns 2 *and* 3 of sched. ii, taken in connection with each other, and *not* to the entry in column 2 only. So that, even if the *period* of limitation in a particular case is the *same* under either the Act of 1871 or the Act of 1877, if the *starting point* of limitation was *later* under the former Act, " the period of limitation prescribed " by the latter Act must be considered *shorter* than that prescribed by the former Act (*Rup* v. *Mohni*, I. L. R., 3 All., 415). Suits on bonds, promissory notes and bills payable on demand have, in effect, a *shorter* period allowed by the Act of 1877. (See *Omrittolall* v. *Howell*, 2 C. L. R., 426 ; also I. L. R., 2 Mad., 113 and 397 ; and I. L. R., 4 Bomb., 87.) Suits by persons excluded from joint family property to enforce a right to share therein under art. 127 also have, practically, a *shorter* period allowed by the Act (*Narain* v. *Lokenath*, I. L. R., 7 Calc., 461).

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context—

[See pp. 178 and 203, *supra*.]

'plaintiff' includes also any person from or through whom a plaintiff derives his right to sue; 'applicant' includes also any person from or through whom an applicant derives his right to apply; and 'defendant' includes also any person from or through whom a defendant derives his liability to be sued:

["Person from or through whom a plaintiff derives his right to sue." The plaintiff may be the heir, successor, executor, administrator, legatee, devisee or assignee of such person. An execution-purchaser (generally) takes subject to all equities affecting the judgment-debtor, and will be bound by constructive notice in the same way as an ordinary purchaser (*Ramlochun* v. *Ramnarain*, 1 C. L. R., 296). But there is a nice distinction between their rights (*Dindyal* v. *Jugdeep*, 1 C. L. R., 49, 56), and for purposes of limitation, the title of a *bonâ fide* purchaser in execution of a decree against the mortgagor, cannot be put on the same footing as the title of the mortgagor, or of a person claiming under a voluntary alienation from the mortgagor, *Anundo Moyee* v. *Dhonindro*, 16 W. R., P. C., 19, 20.]

* 'easement' includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another:

[See Lecture XII, pp. 346, 347, *supra*.]

'bill of exchange' includes also a hundí and a cheque:

'bond' includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligations shall be void if a specified act is performed, or is not performed, as the case may be:

[Single bonds, and bonds subject to a condition, are mentioned in arts. 66, 67, and 68. The word "bond" occurs in arts. 74, 75, and 80. (See *Ball* v. *Stowell*, I. L. R., 2 All., 322.) A *tamasuk* is either a single bond or a promissory note. See notes to art. 66.]

'promissory note' means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight:

* This definition is repealed in the territories to which the Indian Easements Act, 1882, extends. *Vide* sec. 3, Act V of 1882.

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'trustee' does not include a benámídár, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title:

[A *benami* transaction does not create the relation of trustee and *cestui que trust* between the benamidar and the real owner (*Umasundari* v. *Dwarkanath*, 11 W. R., 73; 2 B. L. R., 284). As to mortgagees, see *Baboolall* v. *Jamal*, 9 W. R., 187; Brown, 305. A wrong-doer who enters on an infant's estate, in England, is, *in some respects*, considered as holding as a guardian or trustee, but he is not a trustee within the meaning of the Law of Limitation. See Darby and Bosanquet, 183, 184.]

'suit' does not include an appeal or an application:

[For the meaning of the word "suit" under the old law, see 9 W. R., 402; I. L. R., 2 Calc., 336; I. L. R., 1 All., 97; and pp. 187, 277 (note), *supra*.]

'registered' means duly registered in British India under the law for the registration of documents in force at the time and place of executing the document, or signing the decree or order, referred to in the context:

'foreign country' means any country other than British India;

[The Settlement of Prince of Wales' Island, Singapore and Malacca; Chandernagore, Pondicherry, and Goa; Ceylon; Cashmere, Cooch Behar, &c., &c., are foreign countries. Aden is included in British India. See pp. 202, 230, *supra*.]

and nothing shall be deemed to be done in 'good faith' which is not done with due care and attention.

[The definition of this term, according to the Penal Code, is exactly the same. Absence of actual *mala fides* is not necessarily "good faith." The expression occurs in secs. 14 and 18. It occurred in sec. 10 and arts. 133 and 134 of Act IX of 1871, but has been omitted in the corresponding provisions of this Act.]

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## PART II.

### LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

Dismissal of suits, &c., instituted, &c., after period of limitation.

4. Subject to the provisions contained in sections 5 to 25 (inclusive), every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor

by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

Every suit, &c., must be brought within the time specified in the 2nd schedule, *unless* there is something in the provisions of secs. 5 to 25 of the Act which absolves the plaintiff, &c., from that necessity. The *onus* is on the plaintiff to prove these exceptional circumstances. See *Muhomed* v. *Eakoob*, 24 W. R., 181 and 182; and p. 132, *supra*.

The section applies to cases provided for in the 2nd schedule of this Act (9 C. L. R., 265, 269).

Depositing *money* or giving *security*, *after* the time prescribed by any law, is not governed by sec. 4. For an instance, see *Burjore* v. *Bhagara*, I. L. R., 10 Calc., 557.

"Subject to the provisions."—Not subject to *all* the provisions, but such provisions as are applicable and pertinent to the particular case. (See *Jawahir* v. *Narain*, I. L. R., 1 All., 644, 646; *Banee* v. *Haran*, 24 W. R., 405, 406.)

"Shall be dismissed, although limitation has not been set up as a defence." See pp. 91, 98—101, and 233, *supra*.

This penalty must be enforced even if the defendant is willing to confess judgment. (See *Deb Narain* v. *Ishan*, 13 C. L. R., 153, 155.) The point of limitation is one which, whether it be taken by the defendant or not, the Court is *bound* to entertain, *Ramey* v. *Broughton*, I. L. R., 10 Calc., 652, 658. Instead of dismissing the suit, the Court *may* allow the plaintiff to withdraw his suit in order that he may proceed against the defendant in a foreign Court, where the law of limitation may not be the same as that of British India (I. L. R., 6 Bomb., 103, 107). The Munsiff dismisses a suit as barred by limitation; the Judge, on appeal, sets aside the Munsiff's decision and remands the suit for re-investigation on the merits. The Munsiff then gives the plaintiff a decree in full; the Judge, on appeal, disallows a part of the claim; the plaintiff appeals to the High Court. The defendant prefers a cross-objection to the Judge's finding of fact as to the part decreed. The High Court is bound to consider the question of limitation, although it is not open to the respondents to take this objection of themselves (*Ambala* v. *Naduvakat*, I. L. R., 6 Mad., 325). Compare the cases cited at p. 97, *supra*, and see I. L. R., 8 Bomb., 535.

If the question of limitation has been decided (directly or indirectly) between the parties, it cannot be raised again in a subsequent stage of the same case. See p. 98, *supra*; 11 C. L. R., 113 (where proceedings had been allowed); 11 C. L. R., 145 (where proceedings had been disallowed).

Judgment-debtor cannot raise the plea of limitation in respect of execution-proceedings under which his property has *already* been sold and purchased by a third party (I. L. R., 6 Mad., 237. Cf. I. L. R., 10 Calc., 220).

Where the defendant successfully pleads limitation, the suit must be

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dismissed *with costs*, even if the plea is used for the purpose of refusing to perform admitted obligations. (Banning, 233 ; L. R., 17 Eq., 75.) Where, however, the defendant does *not plead* limitation at the first stage of the case, the Court may refuse to award costs to him. (See I. L. R., 6 Mad., 178 ; and p. 101, *supra*.)

Sec. 4, Expl.

*Explanation.*—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer ; in the case of a pauper, when his application for leave to sue as a pauper is filed ; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

"Ordinary cases."—*Not* pauper suits, *nor* claims made before the official liquidator, nor as regards *new* plaintiffs or defendants substituted or *added* after the institution. See p. 233, *supra*.

"When the plaint is presented to the proper officer."—The suit is instituted, whether the defendant has been served with a *summons* or not. As to the effect of non-service of summons, see sec. 99*a*, Civil Procedure Code ; see also I. L. R., 3 Calc., 312 ; I. L. R., 5 Calc., 126, for the old law on the subject. Delay in the appointment of a guardian *ad litem* for a minor defendant does not affect the date of institution. I. L. R., 4 All., 37.

"Presented."—Where the plaint was really presented on the 29th July, it would not matter if the endorsement on the plaint stated that it was presented on the 31st July, or that it was *not accepted* until the later date, *Young* v. *MacCorkindale*, 19 W. R., 159.

The date of institution is the date of the *first* presentation of the plaint (I. L. R., 4 All., 37). If the plaint is returned for insufficiency of stamp or for any amendment,and then it is presented again within the time allowed or within a reasonable time, the date of the *first* presentation is the date of institution. The same remark applies to appeals. See I. L. R., 2 All., 832, 875 ; I. L. R., 1 All., 260 ; 23 W. R., 447.

It has been held by the Punjab Chief Court, that an appeal is not presented within the meaning of the first para. of sec. 4 if it is not accompanied by the copies of decree and judgment required by sec. 541 of the Civil Procedure Code. (See Rivaz, 16.)

"Proper officer."—Under sec. 48, Civil Procedure Code, the plaint must be presented to the Court or *such officer as it appoints in this behalf*. (See 6 Bomb., 254.) A plaint may not be presented at the *private residence* of the Judge or officer. See 7 N. W. P., 5 ; *contra*, Suth. S. C. Ct. Ref., 36.

"Application for leave to sue as a pauper."—See sec. 410, Civil Procedure Code. Limitation depends on the *date* of the *application*, and not on the day when the application is granted and registered. Marshall, 174. This rule applies even where the applicant, *pending* an enquiry into his pauperism, pays the court-fees and gets his application numbered and

registered as a plaint, provided his original application was a *bonâ fide* one. Skinner *v.* Orde, I. L. R., 2 All., 241, P. C. Cf. I. L. R., 5 Calc., 807, and I. L. R., 2 Calc., 389. ACT XV OF 1877.

"Official liquidator."—An official liquidator is appointed by the Court for the purpose of conducting proceedings in winding up a company and assisting the Court therein. See Act X of 1866, which has been repealed and re-enacted by Act VI of 1882.

The rule enacted by the explanation is *modified* by sec. 22, so far as concerns *new plaintiffs or defendants*, substituted or added after the institution of the *suit*. See p. 233, *supra*.

*Illustrations.*

Sec. 4, Illustrations.

(*a*.) A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The Appellate Court must dismiss the suit.

(*b*.) An appeal presented after the prescribed period is admitted and registered. The Appeal shall, nevertheless, be dismissed.

[This overrules the decision of Sir Barnes Peacock in Bharrut *v.* Issurchunder, 8 W. R., 141. This illustration has been acted upon in Ramey *v.* Broughton, I. L. R., 10 Calc., 652, 659.]

Sec. 5, para. 1.

Proviso where Court is closed when period expires.

5. If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens:

Period of limitation prescribed.—These words occur in para. 1, as well as in para. 2. In Degumber *v.* Kalinath (I. L. R., 7 Calc., 654; (S. C.) 9 C. L. R., 265), a Division Bench of the Calcutta High Court observed that, in para. 2, these words must be read with sec. 4 of the Act, and that they referred to the period prescribed by the second schedule annexed to the Limitation Act, and *not* to any period prescribed by any other Act. (See also Luvar *v.* Luvar, I. L. R., 5 Bomb., 688, as to the meaning of the expression "prescribed period" in Part III, Act IX of 1871.) The same reasoning is applicable to para. 1. But the current of decisions is opposed to this view. The first paragraph, it has been held, applies to suits for which periods of limitation are *specially* prescribed by the Registration Act and the Bengal Rent Act (see p. 214, *supra*); and the principle of the rule laid down in this paragraph has been applied to cases of *depositing money* within a time prescribed by other laws. See I. L. R., 2 Calc., 272; I. L. R., 5 Calc., 906; I. L. R., 3 All., 850; and p. 182 (note), *supra*.

A Division Bench of the Allahabad High Court has applied this prin-

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ciple to the filing of *cross-objections* under sec. 561 of the Civil Procedure Code (Baghelin *v.* Mathura. I. L. R., 4 All., 430).

"When the Court is *closed*." If the Court is not re-opened on the day that it should be re-opened after a vacation, the Court is "closed" withing the meaning of sec. 5 (Bishan *v.* Ahmad, I. L. R., 1 All., 263). It has been held by the Madras High Court (Innes, J., dissenting), that the Court may be *open* within the meaning of this section, even during the annual vacation, and on public holidays, if the *offices* of the Court are open for the presentation of pleadings and other papers (Nachiyappa *v.* Ayyasami, I. L. R., 5 Mad., 189).

Sec. 5, para. 2.

Proviso as to appeals and applications for review.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.

This paragraph corresponds to secs. 333 and 377 of Act VIII of 1859, and applies only to *appeals* and applications for *reviews* of judgments. It does not apply to the filing of a notice of *cross-objections* under sec. 561 of the Civil Procedure Code (Kally *v.* Mangola, I. L. R., 9 Calc., 631); nor to an application for *leave* to appeal *in formâ pauperis* (Lakshmi *v.* Ananta, I. L. R., 2 Mad., 230); nor to applications under arts. 171 and 171*b* (*In re* Ram Shunker, 3 C. L. R., 440, 442; Benode *v.* Sharat, 10 C. L. R., 449, 451); nor perhaps to an application for leave to appeal to Her Majesty in Council (*see* Jowahir *v.* Narain, I. L. R., 1 All., 644). This paragraph does not apply to *suits*. The Court has no power, even for what it considers a sufficient cause of delay, to entertain a *suit* instituted *after* the time allowed by law.

"Sufficient cause, &c." A similar expression is used in the last paragraph of sec. 368 of Act XIV of 1882. (See Benode *v.* Sharat, 10 C. L. R., 449, 453.) The Court has no discretion in the matter until a sufficient cause in point of law has been laid before the Court. Even a mistake on the part of the plaintiff's attorney, specially where no application is made at the earliest opportunity after the discovery of the mistake, is *not* sufficient (The Corporation of Calcutta *v.* Anderson, I. L. R., 10 Calc., 445). An allegation of a mere miscalculation of time is not ordinarily sufficient (Zaibulnessa *v.* Kulsum, I. L. R., 1 All., 250). A mere plea of the appellant's illness is not sufficient cause for not filing an appeal in the District Court until more than fifty days had expired from the date of the decision (Mazoom *v.* Ranchoo, 1 W. R., Misc., 23). The illness of the Mookhtear may be sufficient (9 Moore, 26). The fact that a Full Bench decision or a Privy Council Ruling has altered the view of the law which prevailed at the time of the decision of the original suit, is not a sufficient cause for delay (Makhan *v.* Manchand,

5 Bomb., 107 ; Madho *v.* Rukman, I. L. R., 2 All., 287 ; see also 9 W. R., 181. F. B. ; 18 W. R., 317 ; 19 W. R., 189).

The fact that the respondent was prevented from urging his cross-objections owing to the appellant's withdrawing his appeal, is not a sufficient ground for admitting a substantive cross-appeal after the ordinary time (Surbhai *v.* Raghoonathji, 10 Bomb., 397).

Where a *decree* was first appealed against as an *order*, and such appeal being dismissed, a fresh appeal in the form of an appeal from a *decree* was preferred after the prescribed period, the appeal was admitted by the Allahabad High Court (Rivaz, p. 25).

The necessity of the Local Government communicating with the legal adviser of the Government of India and of the Secretary of State. and the fact that a necessary telegraphic communication was delayed on the road for ten days, were considered sufficient causes for the delay of twelve days on the part of the Secretary of State to prefer an appeal to the High Court from a decree of the Recorder of Moulmein (13 W. R., 245).

An application for review, if made within a reasonable time, and prosecuted with due diligence, is a sufficient cause for the applicant not presenting his appeal within the prescribed period, if he prefers his appeal as speedily as may be after the termination of proceedings consequent on the application for review (Kuller *v.* Jewan, 22 W. R., 79) ; but the mere pendency of an appeal is not a sufficient cause for delay in applying for a review ; nor is ignorance of the effect of a judgment a justification for such delay (Gulam *v.* Sayad, I. L. R., 8 Bomb , 260, and the cases cited therein). See I. L. R., 7 Mad., 584.

The pendency of an application for revision under sec. 622 of the Civil Procedure Code, or of an appeal in a wrong Court under the circumstances contemplated in sec 14, may be a sufficient cause of delay (Bulwant *v.* Gumani, I. L. R., 5 All., 591 ; Banee *v.* Haran, 24 W. R., 405, 406).

An *ex parte* order admitting an appeal may be set aside at the hearing if no sufficient cause for the delay can be shewn (Secretary of State *v.* Mootooswamy, 13 W. R., 245 ; Dubay *v.* Ganeshi, I L. R., 1 All., 34 ; Ramey *v.* Broughton, I. L. R., 10 Calc., 652, 659). But if the appeal after its admission is transferred to an inferior Court (such as the Subordinate Judge's Court) for trial, such inferior Court cannot interfere with the order of admission (Jhotee *v.* Omesh, I. L. R., 5 Calc., 1). The High Court, however, on second appeal, may set aside the order (Chunder *v.* Boshoon, I. L. R., 8 Calc., 251). Exercising an improper and unwarrantable discretion in admitting an appeal may amount to such an irregularity in law as to constitute a ground of special or second appeal (I. L. R , 8 Calc., 251). An order admitting a review after the prescribed period, without any sufficient cause, may also be set aside on appeal (Luchman *v.* Tirbani, 14 B. L. R., 373, P. C.) But where the District Court, after proper inquiry and due consideration, has exercised his discretion in a reasonable manner, the High Court will not interfere with the conclusion arrived at, even though it would itself have

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arrived at a different conclusion (Ranchodji *v.* Lallu, I. L. R., 6 Bomb., 304). The High Court would interfere where the Court below had exercised no discretion at all, or had no legal evidence before it on which it could act, or where it had obviously exercised its discretion in a perverse and improper manner (*ibid.*, p. 308. See also *ex parte* Retso, decided by the Appeal Court in England on the 25th of January 1883).

See Table of Exceptions and pp. 182 (note), 245, 246, *supra.*

Sec. 6.

Special and local laws of limitation.

6. When, by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed.

Sec. 3 of Act XIV of 1859 partially corresponded to this section.

See pp. 214—216, and 230. 232, *supra.* As to the law under sec. 6 of Act IX of 1871, see Timal *v.* Ablokh, I. L. R., 1 All., 254; and p. 213, *supra.* As to *this* section, see I. L. R., 8 Bomb., 529.

It has been held that the general provisions and exceptions contained in Parts II and III of Act XV of 1877 are applicable to suits. appeals or applications for which periods of limitation are specially prescribed by special or local laws. (See Khetter *v.* Dinabashy, I. L. R., 10 Calc., 265; and pp. 214—216, *supra.*) The provisions of secs. 5, 12, 14 and 19, which do not refer to the second schedule of Act XV of 1877, have actually been applied to cases for which periods of limitation are prescribed by laws *other* than the Limitation Act itself. But the provisions of secs. 4 and 7, which *expressly* refer to the second schedule of the Limitation Act, cannot, it is apprehended, be extended to cases for which special periods of limitation are prescribed by any enactment *other* than the second schedule of Act XV of 1877.

It may be mentioned here that the expression "prescribed period" in Part III of Act IX of 1871 was interpreted to mean "period prescribed by Act IX of 1871" (Luvar *v.* Luvar, I. L. R., 5 Bomb., 688).

For the special periods of limitation prescribed by the Bengal Rent Act, see Appendix, *post.*

For the thirty days' limitation to suits for obtaining orders for the registration of documents under sec. 77, Act III of 1877, see I. L. R., 10 Calc., 265.

For the two months' limitation under cl. 5, sec. 17 of the Putnee Regulation VIII of 1819, see Surnomoyee *v.* Land Mortgage Bank, 8 C. L. R., 341. For the three months' limitation under sec. 87, Act III of 1864, B.C., corresponding to sec. 374 of the Bengal Municipal Consolidation Act of 1876, see Chunder *v.* Obhoy, I. L. R., 6 Calc., 8, F. B.

Sec. 14 of Act XIX of 1841 prescribes a period of six months for an application to the Judge for the protection of property against wrongful possession in cases of succession. For other instances of special periods of limitation, see Agnew's Index to the Statutes, Acts, and Regulations.

7. If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

Legal disability.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

Double and successive disabilities.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply.

Disability of representative.

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

This section corresponds to secs. 11 and 12 of Act XIV of 1859.

See Lecture IX.

The section apparently applies to all applications mentioned in the schedule. It would, however, be productive of the greatest inconvenience to apply its provisions to applications for reviews of judgments and other applications made in the *course* of suits or proceedings. But the policy of the law is not to discourage such exceptions (L. R., 17 Eq., 74; and Banning, 81), and the Court is bound to give full effect to the language of the exception (Mahomed *v.* Clara, 2 N. W. P., 173).

The section has been applied to applications for execution. A plaintiff who has obtained a decree during his minority has the *option* either of applying through his guardian to execute the decree during his minority, or to wait until the expiration of his minority before executing his decree. His disability does not cease, because he, through his guardian,

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makes two or more applications for execution, however long the interval between them, provided they are all made during his minority (Monmohun *v.* Gunga, I. L. R., 9 Calc., 181). See also Jagjivan *v.* Hasan, I. L. R., 7 Bomb., 179; Anantharama Ayyar *v.* Karuppanan, I. L. R., 4 Mad., 119; and pp. 257, 260, 261, *supra.*

It is apprehended that, as sec. 7 of Act IX of 1871 did not apply to *applications*, a minor who obtained a decree before the 1st October 1874, in a suit instituted after the 1st April 1873, was bound to make his first application for execution within the three years allowed by art. 167 of that Act. His second application, if made after 1st October 1877, would be governed by the provisions of Act XV. See pp. 210, 229, *supra.*

As to the execution of decrees obtained by minors in suits instituted when Act XIV of 1859 was in force, see Jugmohun *v.* Luchmeshur, I. L. R., 10 Calc., 748.

If a minor who has obtained a decree does make an application for execution, and such application is granted under sec. 230 of the Civil Procedure Code, his subsequent applications must, it is apprehended, be governed by the twelve years' rule laid down in that section.

It is laid down, as a general rule, that infancy is a *personal* privilege, of which no one can take advantage but the infant himself (Behari *v.* Beni, I. L. R., 3 All., 408, 412). See also pp. 261, 266, *supra.*

*Illustrations.*

Sec. 7, Illustrations.

(*a.*) The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.

[The plaintiff here gets an *extension* of four years. See art. 50, sched. ii, which prescribes a period of three years.]

(*b.*) A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

[See art. 123. The plaintiff here gets *altogether* a period of fourteen instead of twelve years, to bring his suit.]

(*c.*) A right to sue accrues to Z during his minority. After the accruer, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease.

[This is an instance of a double and successive disability. The second disability *supervenes* before the first disability has ceased. It is a case of *successive* disability in the *same* person.]

(*d.*) A right to sue accrues to X during his minority. X dies

before attaining majority and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.

[This is a case of *successive* disability in *different* persons, the minority of the legal representative at the time of the death of his minor predecessor.]

(*e.*) A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accruer A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under this section.

[Here the plaintiff gets no *extension* of time by reason of the *proviso* in the last para. of sec. 7. But he is not obliged to sue *before* the expiry of the twelve years allowed to him by the *ordinary* law. See art. 124, and p. 266, *supra*.]

(*f.*) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accruer, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

[See art. 139, which prescribes a period of twelve years. If A's representative in interest, upon whom the representation *devolves* on A's death, is at that time himself under disability, the principle of illustration (*d*) will apply.]

Sec. 8.

Disability of one joint creditor.

8. When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.

*Illustrations.*

(*a.*) A incurs a debt to a firm of which B, C and D are partners. B is insane and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D.

(*b.*) A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

See pp. 268, 269, *supra*.

Sec. 9.

Continuous running of time.

9. When once time has begun to run, no subsequent disability or inability to sue stops it:

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Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

The concluding portion of sec. 11, Act XIV of 1859, partially corresponded to this section. See pp. 235—240, *supra*.

Where time has begun to run owing to the right to sue having accrued to a person not labouring under any legal disability, the subsequent disability of his son or other representative is not a ground of exemption from the operation of the ordinary rule (Mohabut *v.* Ali, 12 W. R., 1; Siddheshur *v.* Sham, 23 W. R., 285).

A disability or inability to sue, *even* at the time when the right to sue accrues, is not a ground of exemption, *unless* it is a disability or inability within the meaning of sec. 5, sec. 7, the proviso to sec. 9, sec. 13, sec. 15, sec. 17, or sec. 18. See pp. 237—239, *supra*.

Sec. 10.

Suits against express trustees and their representatives.

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time.

Section 2 of Act XIV of 1859 corresponded to this section.

See pp. 158—160, and 232, *supra*. Sec. 3, and arts. 98 and 100, 133 and 134.

A "trust," according to Act II of 1882, is an obligation annexed to the ownership of property, and arising out of a confidence reposed in, and accepted by, the owner (*i.e.*, the trustee), or declared and accepted by him, for the benefit of another (*i.e.*, the beneficiary or *cestui que trust*), or of another and the owner. A person legally appointed to succeed a discharged trustee is also a trustee.

A *quasi*-trust, or an obligation in the nature of a trust, is not a trust properly so called. A resulting trust, or a constructive trust, is only a *quasi*-trust. A precatory trust, according to Spence, is an express trust, and so long as the purpose of the trust is specified, or necessarily implied from the words used by the author of the trust, it is a trust within the meaning of sec. 10.

Implied trusts, or trusts which the law would infer merely from the existence of particular facts or fiduciary relations, are not "trusts" within the meaning of this section (Kherodemoney *v.* Doorgamoney, I. L. R., 4 Calc., 455).

An executor, a partner, an agent, a director of a company or a legal adviser has a *fiduciary* character, but none of these persons is *necessarily* a *trustee* in the strict sense of the word. (See I. L. R., 4 Calc., 455, 469.)

A deposit or a bailment does not create such a trust (Banning, 187). As an executor takes the estate subject to the claim of creditors, a charge of debts generally in a will upon the testator's estate does not make the executor a trustee within the meaning of sec. 10; but when particular property is given upon trust to pay a particular debt or debts, the executor has a new duty imposed upon him, and he is a trustee within the meaning of the section so far as the particular property and the particular debts are concerned (Anundo Moyee *v.* Grish Chunder, I. L. R., 7 Calc., 772; Greender *v.* Mackintosh, I. L. R., 4 Calc., 897). So, where an agent is entrusted with funds for the purpose of being employed in a *particular* manner in purchase of land or stock, it has been held in England that there is an express trust to which the Statute of Limitation does not apply.

In order to make a person an express trustee, it must appear either from express words or clearly from the facts that the author of the trust has intrusted the property to the trustee for the discharge of a *particular* obligation. (See Barkat *v.* Daulat, I. L. R., 4 All., 187, 189.)

"*Property* has become *vested*." Trust-property includes trust-money. (See Thackersey *v.* Hurbhum, I. L. R., 8 Bomb., 432.)

Where porperty is *held in possession* by a trustee, it has become "vested" in him, although the ownership has not legally devolved upon him (*per* Markby, J., in Kherodemoney's case, I. L. R., 4 Calc., 455, 468). But, according to the Indian Trusts Act, 1882, the trustee is the legal owner of the trust-property.

For a specific purpose. A purpose *specified* by the author of the trust (I. L. R., 4 Calc., 470). Some *defined* or *particular* purpose or object (I. L. R., 4 Calc., 923). A trust for a specific purpose in sec. 10 does not perhaps correspond *exactly* to an express trust in the English Act. (See I. L. R., 4 Calc, 470.)

Legal representatives or assigns. See p. 264 (note), *supra*, and Azimmunnessa *v.* C. Dale, 6 Mad., 455. A legatee of the trustee is bound in the same way as the trustee himself.

Assigns for valuable consideration. If the assign for valuable consideration purchases the property in *good faith*, and *without notice* of the trust, he has no necessity to rely on any law of limitation. (See Darby and Bosanquet, 343; I. L. R., 1 Bomb., 269; and sec. 64 of Act II of 1882.)

If the assign is *merely* a purchaser for a valuable consideration, arts. 133 and 134 protect him *after the lapse of twelve years*. But if the assign is a *volunteer* with or without notice, time does not run in his favor, in the same way as it does not run in favor of the trustee or his legal representative.

As to the old law on this subject, see p. 188, *supra*.

"For the purpose of following in his or their hands such property." This means "for the purpose of recovering the property for the trusts in question." When property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without *any* bar of time, from the hands of the trustee, his legal representatives

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or assigns (not being assigns for valuable consideration). If the plaintiff sues only for his own personal right to manage, or in some way to control the management of the trusts, sec. 10 does not apply. Where the defendant admits that he is a trustee, and says that he is applying the property to the trusts in question, and there is no evidence to show that he is not so applying the property, sec. 10 has no application (Balwant *v.* Puran, I. L. R., 6 All., 1, P. C.) A claim to vindicate the personal right of a trustee to the possession of property against another person claiming such right in the same character is not governed by sec. 10 (Karim Shah *v.* Nattan, I. L. R., 7 Mad., 417). Compare Sreenath Bose *v.* Radhanath Bose, 12 C. L. R., 371, in which misconduct on the part of the trustee was proved. Where the trusts under a will or deed are invalid, or become inoperative, any person claiming *adversely* to the trust, or on failure of the trust, cannot claim the benefit of sec. 10 as against the trustee appointed by such will or deed. A suit by such a person is not a suit to *enforce the trusts* (I. L. R., 4 Calc., 455; I. L. R., 8 Calc., 798, 801; and 12 C. L. R., 374). In England, the Statute of Limitation does not apply to a suit for an account brought by a *cestui que trust* against his trustee under an express trust, although in certain cases, where the relation of trustee and *cestui que trust* is admitted to be no longer subsisting, and in a few other cases, the Court will refuse relief on the ground of laches and acquiescence. The 36 and 37 Vict., c. 66, sec. 25, cl. 2, enacts, that "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitation." (See I. L. R., 5 Calc., 913 and 914.)

In Saroda *v.* Brojonath, I. L. R., 5 Calc., 910, it was held that where the object of the suit is not to recover any property *in specie*, but only to have an *account* of the trustee's stewardship, the plaintiff cannot have the benefit of sec. 10. The correctness of this decision has been in a manner questioned in Hurro *v.* Tarini, I. L. R., 8 Calc., 766. It was held in this last case that a suit against trustees to charge certain property with trusts created in respect of such property, *and for an account*, was governed by sec. 10. Under sec. 2, Act XIV of 1859, no suit *whatever*, by a *cestui que trust* against a trustee in his *lifetime*, was barred by limitation. I. L. R., 8 Calc., 788; follows Saroda's case.

In Act XV of 1877, there is no *express* provision for a suit against a trustee for the loss occasioned by a breach of trust; but it has been recently held by Scott, J., that where trust-money has become vested in the trustee for a specific purpose, and the loss of such money has been caused by the trustee's misconduct and improper dealing with it, a suit by the *cestui que trust* against the trustee for a refund of the money, although it has passed out of the hands of the trustee, is a suit for the purpose of following the trust-property within the meaning of sec. 10 (Thackersey *v.* Hurbhoom, I. L. R., 8 Bomb., 432, 469).

"Following such property." Recovering the property originally intrusted to the trustee, or the property into which it has been converted,

provided it is capable of being traced in the hands of the trustee, or his representatives not being assigns for valuable consideration. (See sec. 63 of the Indian Trusts Act.)

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Although sec. 10 speaks of suits *against* trustees and their representatives, and does not say that the suits to which it refers must be instituted by any particular person, it has been held that the section only applies where a trustee is sued *by* a *cestui que trust* (Kherodemoney *v.* Doorgamoney, 2 C. L. R., 112 ; same case on appeal, I. L. R., 4 Calc., 455).

Sec. 11.

Suits on foreign contracts.

11. Suits instituted in British India on contracts entered into in a foreign country are subject to the rules prescribed by this Act.

Foreign limitation law.

No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule.

See pp. 43—48, and 230, *supra.*

A suit instituted in a foreign country on a contract entered into in British India is governed by the limitation law of such foreign country. A bond signed and sealed in British India, if sued upon in England, is governed by the twenty years' rule under the 3 and 4 Will. IV, c. 42 (5 C. P. D., 429).

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## PART III.

### COMPUTATION OF PERIOD OF LIMITATION.

[The provisions of secs. 5, 7, 8, and 9 are intimately connected with the rules in Part III. For the probable reason of those provisions being placed in Part II, see pp. 238 (note) and 245, *supra.*]

Sec. 12.

Exclusion of day on which right to sue accrues.

12. In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

[See pp. 234, 235, *supra.*

See p. 203 as to how a number of months or years is calculated.]

Exclusion in case of appeals and certain applications.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for

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obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

Sec. 333 of Act VIII of 1859 partially corresponded to this paragraph.

This paragraph does not mention an application for the admission of an appeal to Her Majesty in Council under sec. 177. Time *requisite* for obtaining a copy, &c., shall be excluded. If the delay in obtaining a copy is due to the appellant or applicant *himself*, he cannot claim the benefit of this provision (Ramey *v.* Broughton, I. L. R., 10 Calc., 652, 661). The application for a copy must be made before the expiry of the prescribed period (20, 30, 60, or 90 days).

See I. L. R., 10 Calc., 655.

Under Circular No. 31 of 30th August 1879, of the Calcutta High Court, the whole of the court-fee and also the fees for the preparation of the copy and the materials for it must be supplied before the applicant is entitled to any exclusion of time.

The time between the date on which the copy is *ready* for delivery, and the date on which the applicant chooses to take delivery of it, is not a portion of the time requisite for obtaining a copy (Gopal *v.* Brojo, 9 C. L. R., 293).

In computing the time requisite for obtaining a copy, the day on which the requisite fees and papers have been filed, and the day on which a proper officer of the Court certifies that the copy is ready for delivery, must each be counted, and the whole time between these two dates, both inclusive, are to be excluded in the computation of the period of limitation. (See W. R., Gap No., p. 645 ; 13 W. R., 245 ; 9 C. L. R., 293.)

Sec. 12, para. 3.

Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

Where a decree is *appealed* against. It has been held that these words, though ambiguous, include the filing of an application for *leave to appeal* to Her Majesty (I. L. R., 1 All., 644). But as para. 2 does not mention such an application, it is apprehended that this para. does not apply to appeals to the Privy Council. Stuart, C. J., has, on other grounds, held, that the paragraph does not apply to such appeals (*ibid*). It has also been held by a Full Bench of the Allahabad High Court, that the paragraph does not apply to appeals under the Letters Patent (Fazul *v.* Phul, I. L. R., 2 All., 192). These Letters Patent appeals are governed by the rules of the Court. (See 12 W. R., 458.)

This paragraph overrules Juggunnath *v.* Shewruttun, 24 W. R., 105, F. B., and allows exclusion of the time requisite for obtaining a copy of the judgment, as well as of the time requisite for obtaining a copy of the decree.

Sec. 12, para. 4.

In computing the period of limitation prescribed for an

application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

See art. 158; see also sec. 522, Civil Procedure Code.

Sec. 13.

Exclusion of time of defendant's absence from British India.

13. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded.

Sec. 13, Act XIV of 1859, corresponded to this section.

See pp. 237 and 246, *supra*, and I. L. R., 8 Bomb., 561.

This section does not apply to *applications* (Ashan *v.* Gungaram, I. L. R., 3 All., 185).

*Plaintiff's* absence from British India, or defendant's *imprisonment* in British India, is not a ground of exclusion. (See 10 W. R., 253.) As to whether sec. 9 modifies the provisions of this section, see Naranji *v.* Mugniram, I. L. R., 6 Bomb., 103; Beake *v.* Davis, I. L. R., 4 All., 530, and p. 237 (note 5), *supra*. The section applies whether, during the absence, service of summons on the defendant can be made or not. But the section does not *prevent* the plaintiff from suing the defendant if he can. The language of the section applies even to cases in which the defendant is represented by an agent in this country by whom suits for and against him may be conducted here. But see Harrington *v.* Gonesh, I. L. R., 10 Calc., 440, where, on an *ex parte* hearing, a Division Bench of the High Court refused to give effect to the plain meaning of the section. (See pp. 247, 248, *supra*.) There is no express provision in this section as to what should be done in the case of the absence of *some* of several defendants. Sec. 8 expressly provides for the disability of *some* of several plaintiffs, and sec. 21, for acknowledgments and payments made by *some* of several defendants, but no such proviso is attached to sec. 13. According to the grammatical meaning of the section, the absence of *some* only of several defendants, even if they are joint-debtors, will *not* suspend the running of time. (See Perry *v.* Jackson, Darby and Bosanquet, p. 38; and Angell, para. 204, note.) And if the plaintiff waits for the return of the absent defendants, he will often find himself altogether barred by limitation. (See Hemendro *v.* Rajendro, I. L. R., 3 Calc., 353, 360.)

Mere entry within British jurisdiction for a temporary purpose, for instance, by touching in a vessel at Bombay, may not be a sufficient termination of the absence from British India. (See Banning, 87.) But if the defendant has returned to British India, the plaintiff's *ignorance* of the fact does not suspend the running of time against him.

Sec. 14, para. 1.

Exclusion of time of proceeding *bonâ fide* in Court without jurisdiction.

14. In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a

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Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Sec. 14, Act XIV of 1859, corresponded to this para.

See pp. 245 and 247, *supra*, and the table of exceptions.

The plaintiff. The section will not apply if the former proceeding was not prosecuted by the *plaintiff* or by some person under whom he claims (Rajah Borodakant *v.* Sookmoy, 1 W. R., 29).

"Prosecuting with due diligence another civil proceeding." "Prosecuted in good faith." The term "prosecuting" is in general applicable to a proceeding *by* a person *as plaintiff*. But the term has been applied to a person who as defendant in a former suit had been unsuccessfully urging a claim of set-off. (See Moharajah Jugutender *v.* Din Dyal, 1 W. R., 310.) But such a person cannot claim the benefit of this section unless the set-off was disallowed for some defect of *jurisdiction* or some other defect of a like nature (Hafizunnissa *v.* Bhyrab, 13 C. L. R., 214). Where the plaintiffs supposed that they had a right, in the first suit against them, to claim a particular sum by way of set-off, and in this they turned out to be wrong in point of law, it was held that they were not entitled to the benefit of this section (*ibid*). *Resisting* an appeal presented by the defendant on the ground of want of jurisdiction is *prosecuting* a suit within the meaning of this section. See Expl. 2. So also resisting an appeal on the merits, when the Court of its own motion dismisses the suit for defect of jurisdiction.

A plaintiff is engaged in *prosecuting a civil proceeding* with due diligence, whilst he is considering whether or no he shall appeal against the decision of the first Court. If he appeals at any time within the prescribed period, he may claim a deduction of the whole period which elapses between the decision of the first Court and the disposal of the appeal (Rajkisto *v.* Beerchunder, 6 W. R., 308).

Whether a suit was prosecuted in *good faith* and with *due diligence*, must, in almost every case, be more or less a question of degree, and the same course of action which, on the part of a plaintiff in a Presidency-town within reach of skilled advice, would indicate bad faith or want of diligence, might be consistent with both good faith and diligence in a *mofussil* community unfamiliar with the refinements of the law, and practically *inops consilii* on such matters (Sheth Kahandas *v.* Dahiabhai, I. L. R., 3 Bomb., 182, 184). Prosecuting an appeal or other proceeding which is *expressly* prohibited by law is not prosecuting a civil proceeding in good faith (Ram Dass *v.* Watson, W. R., Gap No., 371).

Prosecuting a suit until it appeared that the defendant died some time before the filing of the plaint, does not necessarily shew want of good

faith and due diligence. The plaintiff may satisfy the Court that, in not ascertaining whether the party against whom he was proceeding was dead, he was not wanting in due care and caution (Mohun Chunder *v.* Azeem Gazee, 12 W. R., 45).

*Fraudulently* undervaluing a suit and instituting it in the Munsiff's Court, who throws it out for want of jurisdiction, is not prosecuting a suit in good faith.

"Another civil proceeding." A suit, an *appeal*, or an *application* to a Civil Court is a civil *proceeding*. A proceeding to recover mesne profits in the execution department, and a subsequent suit for mesne profits, are both civil proceedings. A proceeding before the Magistrate is not a civil proceeding.

"Whether in a *Court* of first instance or in a Court of *appeal*." An arbitrator or a conciliator is not a *Court*. (See Monohor *v.* Gebiapa, I. L. R., 6 Bomb., 31.) But the time intervening between the application to a conciliator under the Dekkhan Agriculturists' Relief Act, 1879, and the grant of a certificate by him, must be excluded under sec. 48 of *that* Act, in computing the period of limitation of *suits* by such agriculturist (Durgaram *v.* Shripati, I. L. R., 8 Bomb., 411).

*Appeal* includes special as well as regular appeal. The whole time in which a plaintiff has been fruitlessly engaged in prosecuting a suit *bonâ fide*, and with due diligence, for the same cause of action, in which he fails in consequence of a final determination in the suit, whether upon appeal or otherwise, that the Court in which the suit was brought had no jurisdiction, is to be deducted (Lukhinarain *v.* Khettro, 24 W. R., 407 (note), P. C.)

"Against *the defendant*." A former proceeding against a person *other* than the defendant, or any person from or through whom the defendant derives his liability to be sued, is not sufficient (Musst. Munna *v.* Laljee, 1 W. R., 121). A former proceeding against *one* of the defendants in the subsequent suit is not sufficient, specially where the former proceeding was nonsuited for nonjoinder of the parties who are made defendants in the subsequent suit. In such a case the plaintiff's claim against *none* of the defendants will be saved by sec. 14 (Nilmadhub *v.* Kristo Dass, 5 W. R., 281).

A proceeding *bonâ fide* commenced against a debtor who is dead at the time may be a good proceeding under this section against the legal representatives of the debtor; but a proceeding against a person erroneously supposed to be the legal representative of the debtor is not a good proceeding (12 W. R., 45; 10 Bomb., 224).

"Same cause of action." The claim or demand which the plaintiff seeks to enforce, if recoverable, is a "cause of action" (Hurro Chunder *v.* Shoorodhonee, 9 W. R., 402, 406).

The cause of action must be the *same* in both the proceedings. Where the plaintiff brought two suits, one against one branch of the family, and the other against another branch, to *recover a share* of that portion of the property which was in the possession of each, and these suits

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were rejected on the ground of their having been improperly brought, it was held that, in bringing a consolidated suit for a *general partition* against all the sharers, the plaintiff was not entitled to deduct the time occupied in prosecuting his former suits (Jotaram *v.* Bai Ganga, 8 Bomb., 228). A claim of a proprietary right is not the *same* as a claim of a mere leasehold right. (See Parakut *v.* Edapally, 2 Mad., 226.)

"In a Court which from defect of *jurisdiction* or other cause of a *like* nature is unable to *entertain* it." The term "Court" has not been defined to mean a Court having authority in British India or established by the Government of India in British India. It *may* possibly include a *foreign* Court. (See Parry *v.* Appesami, I. L. R., 2 Mad., 407.)

In sec. 14, Act XIV of 1859, the words "of a like nature" were not used; but the interpretation put upon the words "other cause" was, that the other cause must be of a like nature with "defect of jurisdiction." (For this principle of interpretation, see p. 176, note, *supra;* and I. L. R., 8 Bomb., 398, 401.) For the words "unable to entertain it" in Act XV, Act XIV had "unable to *decide upon it*" and Act IX had "unable to *try* it." In Hurro *v.* Shoorodhonee, 9 W. R., 403, Peacock, C. J., was of opinion, that there was no difference between "not having *power* by law" to decide upon a question, and "being unable for want of *jurisdiction* to decide upon it," and that at all events "not having power or authority by law" was a cause of a like nature with *defect of jurisdiction.* But the majority of the Court were of opinion that it was one thing to say that a Court had not the *power* to make, or could not properly make, a *particular order* in a suit, and quite another thing to say that the Court had not *jurisdiction to entertain* the suit, or the particular application which it ought not to grant. Where a proceeding in the execution department for recovery of mesne profits had been finally dismissed, because the Appellate Judge thought that the Lower Court had no power to import into a decree what it did not expressly declare, it was held by the majority of the Court that the proceeding had not been dismissed for defect of jurisdiction or other cause of a like nature.

But where a Court had not really judicial cognizance of the suit until a preliminary condition (such as the filing of a certificate from the Collector under a special Act) had been satisfied, it was held that there was a defect of *jurisdiction* within the meaning of the section (Putali *v.* Tulja, I. L. R., 3 Bomb., 223, 227).

It was held by Sir Barnes Peacock, C. J., that a Court had no *jurisdiction* to decide suit brought against a party who had died before the institution of the suit (12 W. R., 45).

There is no defect of *jurisdiction*, or a like defect, where a suit is dismissed for the plaintiff's omission to give the boundaries of the land sued for (Chunder *v.* Bissessuree, 6 W. R., 184); or where a suit is dismissed because it is brought by an agent in his own name (Rajendro *v.* Bulaky, I. L. R., 7 Calc., 367); or where a claim to set off is disallowed because it is against the law relating to pleas of set-off (13 C. L. R.,

214); or where a Court refuses to entertain a suit for misjoinder of plaintiffs (Ram *v.* Gobind, I. L. R., 2 All., 417; *but* see Deopershad *v.* Pertab Koeree, 13 C. L. R., 218, as to misjoinder of causes of action and misjoinder of parties).

A suit dismissed for non-service of summons under secs. 97 and 99*a* of the Civil Procedure Code, or dismissed under sec. 98, because neither party appears on the day of hearing, or *withdrawn* under sec. 373, is not a suit which the Court is unable to entertain from defect of *jurisdiction* or other cause of a *like* nature. (See 6 W. R., 184; Pirjade *v.* Pirjade, I. L. R., 6 Bomb., 681.) According to Sir B. Peacock, any *neglect* of the plaintiff either in stating his case or prosecuting his suit is not a defect of jurisdiction or other cause of a like nature (6 W. R., 184, 185). And according to Jackson, J., the inability of the Court must be either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself and unconnected with the acts of the parties (6 W. R., 184, 186).

It does not matter whether the final decision throwing out a suit for want of jurisdiction is legally right or wrong. If the former suit has *actually* been dismissed on the ground of want of jurisdiction, the plaintiff may claim a deduction in the computation of the period of limitation (9 W. R., at p. 410). The plaintiff is entitled to the benefit of the section even if he institutes the second suit before the first is actually dismissed for want of jurisdiction (6 Mad., 45).

Sec. 14, para. 2.

Like exclusion in case of order under Civil Procedure Code, s. 20.

In computing the period of limitation prescribed for a suit, proceedings in which have been stayed by order under the Code of Civil Procedure, section 20, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed to the Court in which the suit is re-instituted, shall be excluded.

[This applies where proceedings in a suit are stayed by reason of the defendant, or all the defendants, not residing within the jurisdiction of the Court. See Table of Exceptions.]

Sec. 14, para. 3.

Like exclusion in case of application.

In computing the period of limitation prescribed for any application, the time during which the applicant has been making another application for the same relief shall be excluded, where the last-mentioned application is made in good faith to a Court which from defect of jurisdiction, or other cause of a like nature, is unable to grant it.

Para. 1 allows a deduction in the computation of the period of limit-

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ation of a *suit*, supposing there has been a previous *suit* or *application* relating to the same matter.

This para. allows a similar deduction in the computation of the period of limitation of an *application*, supposing there has been a previous *application* relating to the same matter. Under this paragraph the time during which a decree-holder has been prosecuting with due diligence an application for execution of his decree before a Court which he in good faith believed to be the Court having jurisdiction, should be excluded in computing the period of limitation. (See Rajah Promothonath *v.* Watson & Co., 24 W. R., 303, a ruling in accordance with which the law has now been amended.) Application to the *proper* Court, under art. 179, gives a *fresh start*. A *bonâ fide* application to a wrong Court entitles the decree-holder to a *deduction* in the computation of the period of limitation.

Sec. 14, Expl.

*Explanation* 1.—In excluding the time during which a former suit or application was pending or being made, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

*Explanation* 2.—A plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section.

Sec. 15.

Exclusion of time during which commencement of suit is stayed by injunction or order.

15. In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn shall be excluded.

See the Table of Exceptions.

The section does not apply to *applications* for execution, even where the execution has been stayed by an injunction. But this difficulty is evaded by considering the application of the decree-holder, *after* the removal of the injunction, as only an application for the *continuation* of the former proceedings (Kalyanbhai *v.* Ghanesham, I. L. R., 5 Bomb., 29; Kazi Lutful *v.* Shumbhudin, 10 C. L. R., 143).

See the provisions of sec. 325*a* of the Civil Procedure Code.

Sec. 16.

Exclusion of time during which judgment-debtor is attempting to set aside execution-sale.

16. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a proceeding to set aside the sale shall be excluded.

See the Table of Exceptions, and Gopal *v.* Raj Chunder, 2 W. R., Misc., 9.

Here, the former proceeding is prosecuted by the judgment-debtor, not by the decree-holder or the plaintiff, and the cause of action in the two proceedings is *not the same*. The conditions of good faith, due diligence, and defect of jurisdiction are also *not* necessary.

Sec. 17.

Effect of death before right to sue accrues.

17. When a person who would, if he were living, have a right to institute a suit or make an application dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

When a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

Nothing in the former part of this section applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

See the Table, and p. 238 (note), *supra*.

A perfect cause of action cannot exist unless there is a person in existence capable of *suing*, and until there is somebody who may be *sued*. If such a cause of action has already accrued, and time has once begun to run, no subsequent disability or inability to sue stops it. (Sec. 9.)

But where the right to sue has not accrued to a creditor and time has not commenced to run against him, the fact of there being an interval between his death and the existence of a legal representative *capable* of suing, will have the effect of preventing the running of time against the estate of the deceased creditor. If the cause of action accrues *during* such interval, the legal representative of the creditor will have the full period of limitation from the date of his becoming such legal representative. So, in the case of the death of the debtor before the accrual of the cause of action, time will not run against the creditor until there is a legal representative of the debtor. The principle of this rule applies to all cases except suits for pre-emption and suits for the possession of immoveable property or hereditary offices. The application of the rule to such cases would tend to create insecurity of title. As to who are legal representatives, see p. 264 (note), *supra*. It should be here remarked that an executor may sue before he has proved the will, and

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he may *be sued* after he has proved the will, or after he has acted as executor before proving. An administrator can sue or be sued only from the date of the letters of administration. (See Darby and Bosanquet, pp. 31-33; Banning, pp. 229, 232.)

An administrator suing under art. 86 on a policy effected on the life of an intestate person (governed by the Indian Succession Act) illustrates the first paragraph of this section.

A suit for an account under art. 89 against the administrator of an agent, whose agency terminated on his death, illustrates the second paragraph of this section. (See Lawless *v.* Calcutta Landing and Shipping Co., I. L. R., 7 Calc., 627.)

If such cause of action accrues to a minor or insane representative, he is entitled to the benefit of sec. 7 as well of sec. 17.

Sec. 18.

Effect of fraud.

18. When any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application

(*a*) against the person guilty of the fraud or accessory thereto, or

(*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

Sec. 9, Act XIV of 1859, corresponded to this section.

See Table and pp. 146, 164, 238, 245, and 247, *supra*.

*N. B.*—For the words "adverse possession as against such purchaser commences," in the last two lines of p. 164, read "the adverse possession of such purchaser is deemed to commence."

The law of limitation in this country being express, *dishonesty in obtaining possession* will not prevent the possessor from availing himself of the provisions of that law (*per* Sir Barnes Peacock, C.J., in Kowar Poresh *v.* Watson, 5 W. R., 283). The plaintiff's ignorance of his right to sue does not also prevent time from running against him, unless such ignorance has been brought about by the fraud of the defendant (Arrool *v.* Lalla Gopinath, 8 W. R., 23). In order to constitute fraud, "it is not sufficient that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title while the rightful

owner *is* ignorant of his claims; there must be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts" (21 Beav., 621; Darby and Bosanquet, 193). In the case of immoveable property, a concealed fraud does not mean the case of a party entering wrongfully into possession, but means a case of *designed* fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold (Petre *v.* Petre, 1 Drew, 398; Brown, 505).

Sec. 18 applies to three classes of cases, *viz.*:—

1. Where the cause of action or the *right* to sue is concealed from the plaintiff by the fraud of the defendant.

2. Where the *title* on which the right to sue is founded is so concealed.

3. Where any *document* necessary to establish such right is so concealed.

As regards the first two classes of cases, the date of the statutable cause of action is the date when the fraud *first* becomes *known* to the plaintiff (or the person from or through whom he derives his right to sue).

In the third class of cases, the date of the statutable cause of action is the date when the plaintiff (or the person from or through whom he derives his right to sue) *first* has the *means* of producing the document or compelling its production.

Where the original cause of action is fraud, or where there is fraud in the *inception* of a grant, art. 95 will give the plaintiff a similar extension of time.

Sec. 18 does not apply unless there has been fraudulent *concealment* by the defendant of the plaintiff's right to sue, of his title, or of some necessary document.

If a wrong or tortious act is done by the defendant, and he fraudulently takes steps to conceal the wrong from the plaintiff, limitation does not run against the plaintiff until he discovers the wrong.

If the vendor and vendee of immoveable property *intentionally and actively conceal* the fact of sale from the plaintiff in order to deprive him of his right of pre-emption, time will not run against the plaintiff until he discovers the fraud practised upon him. (See Rivaz, 50.)

A plaintiff who is ousted from his estate under color of a fictitious revenue-sale in pursuance of a fraudulent contract, the fraud being so contrived as to make the plaintiff believe that he had no right of action at all, the fraud would entitle him to claim the benefit of this section. See Dwarkanath *v.* Rajah Ajodhyaram, I. L. R., 2 Calc., p. 8 (note). Withholding copies of defamatory official reports with the *direct* purpose of throwing the plaintiff over the period of limitation *may* be fraudulent concealment (1 Ind. Jur., N. S., 192).

If the defendant, by reason of the relation in which he stands to the plaintiff, or otherwise, is *bound* to give him certain information, the *with-*

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*holding* of such information, though not an *active* concealment, may amount to fraudulent concealment. (See Brown, 505, 506; sec. 17, Indian Contract Act.)

An agent receiving money for his principal, and concealing the fact from him, is guilty of fraud; and this section applies to a suit by the principal for the recovery of such money (Hossein *v.* Syud Tussudduck, 21 W. R., 245).

Fraudulently concealing a will from a legatee is a fraudulent concealment of his title and of a document *necessary* to establish his right to the legacy to which he is entitled under the will. But a document which is merely *useful* in evidence, is not a necessary document within the meaning of the section (Lakminarasu *v.* Aukinid, 7 Mad., 23; see also Robert *v.* Lombard, 1 Ind. Jur., N. S., 192).

A fraud committed by a third person does not extend the time against the defendant, unless he is accessory to the fraud, or unless he stands in the shoes of such third person. (See Ramdoyal *v.* Ajoddhea, I. L. R., 2 Calc., 1; Gopal *v.* Pesim, 1 B. L. R., 76.)

A person claiming in good faith, and for a valuable consideration, from the person guilty of the fraud or accessory thereto, does not stand in his shoes. In a suit against such a *bonâ fide* purchaser the plaintiff cannot compute the prescribed period from the date when the fraud is discovered, or even from the date of the purchase. In such a case, time runs against the plaintiff, and in favor of the defendant, from the date of the original cause of action. (See p. 164, *supra.*) The adverse possession of such a purchaser is deemed to commence from the time when the plaintiff is deprived of his property by the vendor's fraud, so that the purchaser is at once protected on making his purchase if the prescribed time has expired previously to his purchase. (See Banning, 221.) A donee or legatee of the perpetrator of the fraud, or even a purchaser for value if the purchase is not made in *good faith*, is not entitled to this protection.

In the first two classes of cases limitation runs from the date when the fraud first *became known*, not from the time when, with reasonable diligence, it *might have been* first known or discovered. In this respect, the Indian law differs from sec. 26 of 3 and 4 Will. IV, c. 27. (Compare Sir James Colvile's first Bill for the limitation of suits with his amended Bill of 1859.) But although want of diligence on the part of the plaintiff does not necessarily deprive him of his privilege under sec. 18, the Court *may*, from the existence of the *means of knowledge* of the fraud, find as a *fact*, that the plaintiff had *actual* knowledge of it. (See 8 C. L. R., 184; and p. 226, *supra.*)

In the case of concealed documents, it is expressly enacted that time is to run (not from the date of the discovery of the document but) from the date when the plaintiff first had the *means* of producing it or compelling its production.

The plaintiff must give clear proof of the fraud alleged by him Brown, 503, 504; I. L. R., 3 Mad., 384, 397, P. C.) In a case where the

plaintiff alleged that a grant which he wanted to set aside had been fraudulently concealed from him, the Privy Council held that he should have stated what was the occasion of the discovery of the fraud or the circumstances which led to it; and that as the plaintiff had been guilty of extraordinary inaction, he should have given an explanation of his conduct. (Venkateswara *v.* Shekhari, I. L. R., 3 Mad., 384, 399, P. C.)

Sec. 19.

Effect of acknowledgment in writing.

19. If, before the expiration of the period prescribed for a suit or application, in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

*Explanation 1.*—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

*Explanation 2.*—In this section 'signed' means signed either personally or by an agent duly authorized in this behalf.

Sec. 4, Act XIV of 1859, corresponded to this section.

See Lecture X, p. 238, *supra*, and I. L. R., 9 Calc., 730.

It has been held in England that the following words written by the debtor contain a *sufficient* acknowledgment: "I beg of you to send in your account" (Quincey *v.* Sharpe, 1 Ex. Div., 72).

Where the debtor draws a *hundi* in favor of his creditor, in consideration of the debt due by him, and the *hundi* being dishonored by the drawee, the creditor sues the debtor for the original debt, the debtor's acknowledgment of liability under the *hundi* is, on a reasonable construction of sec. 19, a sufficient acknowledgment of liability for the *original debt* (Raman *v.* Vairavan, I. L. R., 7 Mad., 392).

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Sec. 20.

Effect of payment of interest as such.

20. When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

Effect of part-payment of principal.

or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

Effect of receipt of produce of mortgaged land.

Where mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section.

See Lecture XI.

Following the *ratio decidendi* in Ramhit *v.* Satgur, I. L. R., 3 All., 247, F. B., it has been held by the Allahabad High Court, that part-payments of *judgment-debts* fall within the terms of sec. 20 (Janki *v.* Ghulam, I. L. R., 5 All., 201. See also p. 315, note 4, *supra*).

All that is required by sec. 20 is, that the fact of a *part-payment* should appear in the handwriting of the person making the same. It is not necessary that the appropriation of the payment to principal should appear in writing. That may be made to appear otherwise. The endorsement of payment on a bond need not shew that the payment is made as a part-payment of the principal of the debt (Jada Aukamma *v.* Nadimpalle Rama, I. L. R., 6 Mad., 281).

Sec. 21.

One of several joint contractors, &c., not chargeable by reason of acknowledgment or payment made by another of them.

21. Nothing in sections 19 and 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them.

The concluding portion of sec. 4, Act XIV of 1859, corresponded to this section.

See pp. 301, 302, and 314, *supra*.

The plaintiff may, notwithstanding this section, shew that the joint

contractor, partner, executor, or mortgagee, who signed the acknowledgment or made the payment, was acting as the duly authorized agent of the *other* parties.

It has been held in England that, as long as a partnership continues, each partner is an agent for the purpose of making an acknowledgment under the Statute of Limitations. But after a partnership is dissolved, one of the late firm cannot, by his act or admission, involve his co-partner in any new liability, and a payment made by a continuing partner will not revive a debt to the detriment of the retiring partner (Watson *v.* Woodman, L. R., 20 Eq., 721, 730; Banning, 80, 208). It should, however, be observed that the provisions of the English law on this subject (9 Geo. IV, c. 14, sec. 1; and 19 & 20 Vict., c. 97, sec. 14) do not expressly refer to *partner*, as the Indian law (sec. 21) does. In Khoodeeram *v.* Kishunchand, 25 W. R., 145, a Division Bench of the Calcutta High Court held, that the corresponding provisions of Act IX of 1871 (sec. 20, expl. 2) did not apply to cases where one partner, by the ordinary rules of partnership, was able to bind his co-partner. Every partner of a firm, which is of a *mercantile* character, is deemed to be duly authorized to borrow money and draw and accept bills in the name of the firm. (See sec. 251, Indian Contract Act, and 10 Bomb., 322.) The members of a carrying company, or a mining company, or of a firm of attorneys, have no such *implied* authority (*ibid*).

Sec. 22.

Effect of substituting or adding new plaintiff or defendant.

22. When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Proviso where original plaintiff dies.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff:

Proviso where original defendant dies.

Provided also, that when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.

See p. 233, *supra*.

This section speaks of suits, plaintiffs, and defendants. It does not say anything about appeals, appellants, and respondents. Sec. 32 of the Code of Civil Procedure, which provides for adding parties in the Court of *first* instance, contains an express reference to this section; but sec. 559 of the Code, which provides for the addition of respondents, contains no such reference. If sec. 22 of Act XV of 1877 were appli-

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cable to sec. 559 of the Code, it would be in the power of the appellant to exclude the discretion of the Court by filing his appeal on the last day allowed by the Limitation Act for that purpose (Manickya *v.* Boroda, I. L. R.. 9 Calc , 355, 362). Under Acts VIII and XIV of 1859 also, the Appellate Court had a similar discretion in the matter of adding a fresh respondent to the record (Showdamonee *v.* Ram Roodro, 8 W. R., 367). In a case where the liability of the two defendants was joint, and the plaintiff, by an oversight, appealed against the first defendant only, and the second defendant was made a respondent *after* the time allowed for appealing against him, it was held that sec. 22 did not bar the appeal, even so far as it affected the second defendant (The Court of Wards *v.* Gaya Persad, I. L. R., 2 All., 107, 109). But in a case where the plaintiff sued two defendants jointly and severally for certain monies, and obtained a decree against the first defendant only, and the first defendant having appealed against the plaintiff, the Judge made the second defendant a party to the appeal, after the time for appealing against him had expired, it was held by the Allahabad High Court, that sec. 582 of the Code of 1877, read with sec. 32 of the same Code, made sec. 22 of the Limitation Act applicable to the case (Ranjit *v.* Sheo Persad, I. L. R., 2 All., 487). The Judges, however, made no reference in this case to sec. 559 of the Code. Besides, it is now evident from (the amended) sec. 582 of the Code, 1882, that the terms "plaintiff" and "defendant" in sec. 32 of the Code do not include "appellant" and "respondent."

In a case where a principal and a surety were originally sued, and the plaintiff appealed against the surety only, it was held that the discretionary power of directing a person to be made a respondent conferred on the Appellate Court by sec. 559 of the Code was not limited by sec. 22 of the Limitation Act (Manickya *v.* Boroda, I. L. R., 9 Calc., 355).

But where a defendant, having an unappealed decree in his favor, is *not interested in the result of the plaintiff's appeal* against a co-defendant, sec. 559 of the Code does not empower the Court to add him as a respondent to the appeal (Atmaram *v.* Balkishen, I. L. R., 5 All., 266).

In another case (The Corporation *v.* Anderson, I. L. R., 10 Calc., 445) whereon the suggestion of the original defendant that another person was liable, the Court made him a defendant, but the suit being decreed against the original defendant, that defendant appealed against the plaintiff without making his co-defendant a respondent, it was held, that the plaintiff could not, after the period for appealing from the decree had elapsed, be allowed to *appeal* against the added defendant, unless he satisfied the Court under sec. 5 that he had sufficient cause for not prosecuting his appeal within that period. The question, whether the second defendant could be added as a respondent to the original appeal was not considered, probably because, in the appeal against the plaintiff by the original defendant, the liability of that defendant could not be shifted to his co-defendant.

If the substitution or addition of parties to the record, in the Court of first instance, takes place after a new law of limitation has come into operation, the suit as regards the original parties will be governed by the old law, and as regards the new parties by the new law. (See Abdul *v.* Manji, I. L. R., 1 Bomb., 295.)

Where some only of several joint promisees sue to enforce a *joint contract*, and the other promisees are made co-plaintiffs after the expiry of the period of limitation, the *whole* suit must be dismissed, provided the defendant has objected to the nonjoinder in proper time (Ramsebuck *v.* Ramlal, I. L. R., 6 Calc., 815; Kalidas *v.* Nathu, I. L. R., 7 Bomb., 217; Oomasundari *v.* Ramji, 9 C. L. R., 13; I. L. R., 7 Calc., 242).

In such cases of nonjoinder, amendment is practically useless in British India, if it is made *after* the period of limitation (I. L. R., 6 Calc., 823).

Where the plaintiff sued A to enforce a right of pre-emption, and thereby to invalidate a sale made to A and B *jointly;* and B was made a defendant after the expiry of the prescribed period, the Allahabad High Court dismissed the *whole* suit (Habibullah *v.* Achaibar, I. L. R., 4 All., 145).

But where certain property was in the possession of several *tort-feasors*, and plaintiff at first sued to recover from one only, and made the other defendants after the limitation period had expired, it was held that the suit was barred as against the added defendants only (Obhoy *v.* Kritartha, I. L. R., 7 Calc., 284).

Where a plaintiff brought a suit as *assignee* of a mortgage, and was subsequently allowed to amend his plaint and sue as *attorney* of the original mortgagee, it was held that there was no substitution of a new plaintiff (Ganapati *v.* Adarji, I. L. R., 3 Bomb., 312).

The substitution of the name of the President of a Committee for that of their Secretary, neither of the officers being *personally* liable, is not a substitution within the meaning of this section (Mauni *v.* Crooke, I. L. R., 2 All., 296).

Where the defendant entered into a contract of loan with the *kurta* of a Hindoo family, and the *kurta* sued to enforce the contract, it was held that, that the addition as parties of other members of the family interested in the loan after the prescribed period had expired, did not prevent the Court from giving the *kurta* a decree for the *whole* amount (Radha Churn *v.* Mohesh Chunder, 3 Shome's Reports, p. 99). This decision would not be opposed to the ruling in Ramsebuck's case, if it was found as a fact that the contract was really made between the defendant and the *kurta* only, for in that case the joinder of the other members was only a *misjoinder*. (See I. L. R., 6 Calc., 824.)

Paras. 2 and 3 of this section speak only of the *legal representative* of a party at his death; but it has been held that the principle of the proviso applies to the *assignees* of the original parties. When the plaintiff, after instituting his suit, assigns his interest, it is perhaps not necessary for the assignee to become a party at all; but if he does so, he only con-

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tinues the suit, *not in substitution*, but in *conjunction* with, and as the representative in interest of, the original plaintiff (Suput *v.* Imrit, I. L. R., 5 Calc., 720).

The principle of the proviso was, under the old law, applied to a case in which the person originally named as defendant was dead at the time of the institution of the suit, and his heirs were made parties after the expiry of the prescribed period (Sreekishen *v.* Ramkristo, 10 W. R., 317). But where the plaintiff, erroneously believing that A was the legal representative of a deceased debtor, brought his suit in time against him, and after the expiry of the period of limitation, made the true representatives parties to the suit, it was held that the suit was barred (Kuvasji *v.* Barjoiji, 10 Bomb., 224).

Sec. 23.

Continuing breaches and wrongs.

23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

See pp. 218, 219, 222, and 241, *supra*.

This section differs from secs. 23 and 24 of Act IX of 1871. Where the obligation created by a contract is of a *recurring* kind, and admits of a series of "successive breaches," this section does not apply, but sec. 23 of Act IX *did apply* to such cases (Bhojraj *v.* Gulshan, I. L. R., 4 All., 493. Art. 115 provides for some of these cases). Sec. 24 of Act IX referred to continuing nuisances only, and the term "nuisance" was defined to mean "anything done to the hurt or annoyance of another's *immoveable* property, and not amounting to a trespass." Sec. 23 of Act XV applies to any "continuing wrong independent of contract."

This section is not confined to suits for compensation only.

A continuing breach of contract. The section contemplates cases in which the obligation created by the contract is *ex necessitate* of a continuing nature. As for instance, a covenant by a tenant to keep the demised building in repair (I. L. R., 4 All., 493, 496).

If a person, having made a gift of his property to another, conveys the same to a third person, his covenant for title, so far as it relates to his *present right* to convey, is broken at the date of the conveyance; and sec. 23 does *not* give the covenantee a continuing cause of action; but a covenant for "quiet possession" admits of a continuing breach. A covenant for "further assurance" is broken by a refusal of the covenantor to execute, or procure to be executed, a proper further assurance when tendered to him on the part of the covenantee (Raju *v.* Krishna, I. L. R., 2 Bomb., 273, 292).

Where an amicable partition of joint property is made between A and B, but C having a claim over the property allotted to B, it was agreed that A should pay a certain amount to C, A's failure to pay the amount

to C and thus to make B's title perfect, was held to be a continuing breach of contract (Imdad *v.* Nijabat, I. L. R., 6 All., 457).

The question as to the more or less continuous nature of covenants for title and for further assurance, was considered by Kelly, C.B., in Spoor *v.* Green (L. R., 9 Exch., 99). According to the Chief Baron, a covenant for title and a covenant for further assurance are continuing covenants, and the breaches of them continuing breaches. The covenantee is not bound to sue until the ultimate damage has been sustained. The Statute of Limitation is wholly inapplicable to breaches of the covenant for title, except where the right of action is upon an eviction of the *whole* property conveyed, so that there is no land with which the covenant may run, and nothing left upon which the covenant can operate. (See Banning, 176, 183.)

The relation of husband and wife (so far as it is the result of a contract) furnishes another illustration of a *continuing* obligation, and so long as the wife withholds herself from her husband, there is a continuing breach of contract. (See the ruling of a Full Bench of the Punjab Chief Court, cited in Rivaz's Limitation Act, p. 102.)

A continuing wrong independent of contract. A "tort" is a wrong independent of contract. (Broom's Commentaries.) The term "tort" is used to signify such wrongs as are in their nature distinguishable from breaches of contracts. Torts are often considered as of three kinds, *viz.*, *nonfeasance*, or the *omission* of some act which a man is *bound to do; misfeasance*, being the *improper performance* of some act which he *may lawfully do;* or *malfeasance*, being the *commission* of some act which is *unlawful.* (Stephen's Blackstone.)

The flowing of water from defendant's premises into the plaintiff's land, when the defendant has not acquired any easement over such land, is a *continuing* wrong. (See Ramphul *v.* Misreelall, 24 W. R., 97.) Obstructions to or diversions of watercourses are also *continuing* wrongs (Rajrup *v.* Abdul, I. L. R., 6 Calc., 394, P. C. See also I. L. R., 1 Mad., 335; and I. L. R., 6 Bomb., 20). As long as a *nuisance* remains in force, the person affected by it has a continuing cause of action, and may recover damages on account of it, or sue for an injunction for its removal. A *trespass* on immoveable property continues to be a trespass until the occupation of the trespasser comes to an end (Narasinma *v.* Ragupathi, I. L. R., 6 Mad., 176, 178).

False imprisonment is a continuing wrong, which is specially provided for by art. 19. (See p. 241, *supra.*)

Sec. 24.

Suit for compensation for act not actionable without special damage.

24. In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

*Illustrations.*

(*a.*) A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.

(*b.*) A speaks and publishes of B slanderous words not actionable in themselves without special damage caused thereby. C in consequence refuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence till the refusal.

See pp. 221, 222, 241, 242, *supra*, and the notes to arts. 2 and 25.

In Illustration (*a*), the original *act* itself is no wrong, and only becomes so by reason of the consequential damages. Cases of damage to neighbours caused by the escape of water artificially collected on one's own land, or by any other act in violation of the maxim *sic utere tuo ut alienam non-lædas* (see 22 W. R., 278, P.C.; and I. L. R., 3 Calc., 776) fall within this principle.

In Illustration (*b*) the original act itself does not give the plaintiff a *legal* cause of action. The violation of some duty towards the public, productive of *special* damage to the plaintiff, is governed by the same rule. The breach of such a duty does not give any individual a cause of action until he has suffered some special damage. (See Banning, 271.) The same principle will also apply to negligent acts of the master causing damage to the servant, and to the unskilful conduct of professional men causing damage to those who employ them. In all these cases no cause of action arises until the damage is suffered. (See Collett on Torts, secs. 18 and 21.)

Sec. 25.

Computation of time mentioned in instruments.

25. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

*Illustrations.*

(*a.*) A Hindú makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian calendar.

(*b.*) A Hindú makes a bond, bearing a Native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiry of one year after date computed according to the Gregorian calendar.

See pp. 203, 233, and 234, *supra*.

Where a bond, by its terms, stated that the money advanced should be repaid on the 30th Pous 1283, B. S.; and it so happened that, in the

year 1283, the month of Pous consisted only of 29 days (the 29th Pous corresponding to the 12th January 1877), it was held that the money became repayable on the 13th of January 1877, and that a suit brought on the 13th January 1880 was in time (Almas Banee *v.* Mahomed Ruja, I. L. R., 6 Calc., 239).

Section 25 lays down an *absolute* rule. There is no saving of cases in which it appears on the face of the instrument that *lunar* months and *lunar* years were intended by the parties. The period within which a debt is repayable *must* be computed according to the Gregorian calendar (Rungo *v.* Babaji, I. L. R., 6 Bomb., 83).

Periods of *limitation* in acts to which the General Clauses Act apply, as well as those to which they do not apply, are reckoned according to the English or Gregorian calendar, unless a contrary intention is expressed (Saroda *v.* Pahali, I. L. R., 10 Calc., 913).

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## PART IV.*

### ACQUISITION OF OWNERSHIP BY POSSESSION.

Sec. 26.

Acquisition of right to easements.

26. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

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* Secs. 26 and 27 of Part IV are repealed in the territories to which the Indian Easements Act, 1882, extends. All references in any Act or Regulation to the said sections or to secs. 27 and 28 of Act No. IX of 1871 shall, in such territories, be read as made to sections fifteen and sixteen of Act V of 1881. *Vide* sec. 3 of the Indian Easements Act (V of 1881).

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*Explanation.*—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

*Illustrations.*

(*a.*) A suit is brought in 1881 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January 1860 to 1st January 1880. The plaintiff is entitled to judgment.

(*b.*) In a like suit also brought in 1881 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1858 to 1878. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(*c.*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

See Lecture XII, pp. 409, 414—429, *supra*.

Light or air. In Sturges *v.* Bridgeman (11 Chan. Div., 852), and in other English cases, it has been held that, under the 2 and 3 Will. IV, c. 71, there cannot be an easement of wind, or of air *in motion*.

In Bagram *v.* Khetternath (3 B. L. R., O. C., 18, 46), Peacock, C. J., was of opinion, that a right to enjoy the south breeze could not be acquired except by an express grant; and that, in the case of a right to air, the obstruction to be actionable must amount to a nuisance. In Barrow *v.* Archer (2 Hyde, 125), it was held that a right to the free and uninterrupted passage of a current of wind could not be claimed by reason of mere long enjoyment, and that no more air could be so claimed than what was sufficient for sanitary purposes. In Act V of 1882, the Legislature does not follow these rulings, on the ground that they are unsuited to a country like India. The Act allows a suit for the obstruction of the free passage of air, where it interferes materially with the plaintiff's physical *comfort*, although it is not injurious to his *health*. (See Statement of Objects and Reasons, *Gazette of India*, 30th November 1880.) It should be observed that sec. 3 of 2 and 3 Will. IV, c. 71, speaks only of the "access and use of light," and that sec. 26 of Act XV

of 1877 places the right to light and the right to air (as regards their acquisition by prescription) in the *same* category. Sec. 27 of Act IX of 1871 also applied the same rule to both the rights.

The windows of a new building must be in a sufficiently finished state at the date from which the twenty years are to be computed. (See Elliott *v.* Bhoobun, 6 B. L. R., 85; and 12 B. L. R., 406, P. C. Cf. Pranjevandoss *v.* Moyaran, 1 Bom., 148.) As the acquiescence of the servient owner is not necessary to the acquisition of a right under the *Act*, the ruling in Elliott's case that there may be interruption *without* an *actual* obstruction does not apply to such acquisition.

Way. A right of way is a right to go from one place to another, and ought to be circumscribed to a place certain, and not in one place to-day and another to-morrow, and therefore the *termini a quo* and *ad quem* should appear (Gale, 357, note; 4 W. R., 49).

In English or Indian law there is no positive division of rights of way into distinct classes, and it cannot be said that a superior class of rights *necessarily* includes an inferior class. (See Gale, 352, 355, note.) The following are some of the various kinds of rights of way to be met with in the books:—

A *general* right of way,—*i.e.*, a way usable for *all* purposes, *e. g.*, a way for marriage and funeral processions, as well as for other purposes. (See Lokenath *v.* Monmohun, 20 W. R., 293.) A way for agricultural purposes only. A right of way for carriages, but not for carts. A right of way for horses, and not for carriages. A right of way for the carriage of coals only. A right of way for the carriage of all other articles except coals. A footway or prime way. A drift way or pack way for cattle. A way for boats. A way to Church. A way to market. A right to use the way only when certain gates are open or between particular hours, or at certain seasons of the year. (See 10 W. R., 363.)

The extent of a right of way acquired by prescription is measured by the accustomed user. As to whether the evidence of the actual user in any particular case may prove a general right for all purposes, see pp. 439, 440, *supra*. The question whether a user of one kind is evidence of a right also for a more limited purpose, must be determined with reference to the particular facts of each case; and if the actual amount of inconvenience suffered by the servient owner is not in any way increased by the exercise of such inferior right, the presumption is that such a right has been acquired. (See Gale, 352, 353; Goddard, 247, 248.) A right of way *per se* does not give a right to carry burdens on the head, for such a right would impose a *more onerous* obligation on the servient owner, who, if he wanted to build, must leave a higher space than he would otherwise be obliged to do. (See Gale, 356, note.)

Where a right of way for a particular purpose (*e. g.*, for carrying away the plaintiff's nightsoil) is proved, the Court is not bound to confine the right to the precise *number of times* in the year that it has been exercised; but may give the evidence of user a more liberal construction, and hold

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that the right may be exercised for such purpose at all convenient times in the year, or as often as is necessary (Gopal Chunder *v.* Jodoolall, I. L. R., 9 Calc., 778).

It is a mistake to suppose that the same rights *usque ad cœlum* attach to an easement on land which attaches to the land itself. The erection of a portico or verandah, even when it encroaches on part of the space devoted to the way, is not actionable unless it interferes with the reasonable enjoyment of the easement (Toolseymoney *v.* Jogesh, 1 C. L. R., 425; Clifford *v.* Hoare, L. R., 9 C.P., 362).

A right of way may be established notwithstanding the fact that the path passes over *waste* land (Shaikh Mahomed *v.* Shaik Sefatoollah, 22 W. R., 340; but see some remarks of Loch, J., in 14 W. R., 199).

Watercourse. This word designates both the channel and the moving *water* as it flows in the channel. In the English Prescription Act the word is used with reference to the moving water. (Goddard, 122, 123.) It has been held in England, that a claim of right to pollute or adulterate the water of a natural stream is a claim of a watercourse. (Gale, 169.) A right to pour water over the land of another person or a right to divert water from flowing down to particular land is also a right to a watercourse. (Goddard, 123.) The right to discharge rain-water by eaves or by drain or gutter (stillicidium or flumen) is a right to a watercourse. (Gale, 273.)

Water in a tank is not a watercourse; but there may be an easement to use such water. There may also be a prescriptive easement to throw stones or other refuge in a tank, provided the right does not tend to the total destruction of the servient heritage. In Carlyon *v.* Lovering, cited in Gale's work, p. 485 (note), such a right in the case of a stream was recognized. The placitum in Sreedhur *v.* Adoyto, 20 W. R., 237, that there can be no prescriptive right to injure another, though such injury has the warrant of very ancient user, can hardly be correct. (See Gale, 484, note.)

Sec. 27.

**Exclusion in favour of reversioner of servient tenement.**

27. Provided that, when any land or water upon, over, or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

*Illustration.*

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that, during ten of these years, C, a Hindú widow, had a life-interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

See pp. 429, 430, *supra*.

The corresponding section of Act IX of 1871 expressly excepted the right to light and air from its operation. This section omits the exception. It applies to *all* easements which have been enjoyed or derived upon, over, or from any land or water.

Sec. 28.

Extinguishment of right to property.

28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

See Lecture.

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## THE FIRST SCHEDULE.

(*See section* 2.)

| Number and year of Acts. | Title. | Extent of repeal. |
|---|---|---|
| X of 1865 ... | The Indian Succession Act. | In section 321, the words "within two years after the death of the testator, or one year after the legacy has been paid." |
| IX of 1871 ... | The Indian Limitation Act, 1871. | The whole. |
| X of 1877 ... | The Code of Civil Procedure. | Section 599, and in section 601 the words "within thirty days from the date of the order." |

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ARTS. 1, 2.

## THE SECOND SCHEDULE.

(*See section* 4.)

FIRST DIVISION: SUITS.

*Part I.—Thirty days.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 1.—To contest an award of the Board of Revenue under Act No. XXIII of 1863 (*to provide for the adjudication of claims to waste lands*). | Thirty days ... | When notice of the award is delivered to the plaintiff. |

No. 1. (No. 1, Sched. II, Act IX of 1871.) The suit under this article is instituted (in a Court *specially* constituted under Act XXIII of 1863) by the claimant, or objector, on receipt of notice of the Board's adverse award. The Collector notifies such award to the special Court, and the Court gives notice to the claimant or objector. This article does not apply to suits *by Government* to try claims to waste lands where such claims have been *admitted* by the Revenue Authorities. See secs. 5 & 7 of Act XXIII of 1863, and Taranath Dutt *v.* The Collector of Sylhet and others, 5 W. R., Waste Land Court's Reference, p. 1, where it was held that the Court could not extend the period of limitation by any order of its own. The exceptions recognized by Act XV may, of course, extend that period.

*Part II.—Ninety days.*

| | | |
|---|---|---|
| 2.—For compensation for doing, or for omitting to do, an act alleged to be in pursuance of any enactment in force for the time being in British India. | Ninety days ... | When the act or omission takes place. |

No. 2. (No. 2, Act IX.) Local or special Acts may lay down a longer or shorter period of limitation for such suits for compensation. This article, like several other articles in this schedule, applies to suits for *compensation*, not to suits for *recovery of land* or declaration of title. See Foot *v.* Mayor of Margate, 11 Q. B. D., 299; Chunder *v.* Obhoy, I. L. R., 6 Calc., 8, F. B.; Birj *v.* The Collector, I. L. R., 4 All., 102.

It does not also apply to suits to recover the *price* of goods supplied to a public servant. See Mayandi *v.* McQuahar, I. L. R., 2 Mad., 124.

A suit for a refund of money illegally levied may be treated as a suit for compensation. See Ranchhod *v.* The Municipality, I. L. R., 8 Bomb., 421; see also I. L. R., 2 Mad., 124, 125. Compensation for an act without color of, and contrary to, the law, if done *bonâ fide*, cannot be sued for *after* the period allowed. See Gooroodas *v.* The Collector, 5 W. R., 137; see also I. L. R., 8 Bomb., 421. If the act complained of (such as excavating a road) does not give rise to a cause of action until some special damage results therefrom (such as the falling of plaintiff's wall), the period will, under sec. 24, be computed from the time when the injury results. See Roberts *v.* Reid, 16 East, 215; Goddard, 331.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

ACT XV OF 1877. — ARTS. 3—6.

*Part III.—Six months.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 3.—Under the specific Relief Act, 1877, section 9, to recover possession of immoveable property. | Six months | When the dispossession occurs. |

No. 3. (Sec. 15, Act XIV of 1859; and No. 3, Act IX of 1871.) See pp. 330, 331, *supra.*

As to what amounts to possession or dispossession, see Lecture VI, *supra.* Carrying off the produce of land in the occupation of a tenant does not necessarily amount to dispossession (Seetal *v.* Judoo, 25 W. R., 180).

A landlord ejecting a *tenant*, of his own authority, after the expiry of the term of the lease, may be sued under this article (Jonardun *v.* Haradhon, 9 W. R., 513, F. B.) But an owner of land returning upon his own property cannot be so sued by an *agent*, who had been put into possession on behalf of such owner (Madhub *v.* Sham, I. L. R., 3 Calc., 243; see pp. 137, 151, 152, *supra*). *Partial* dispossession of a house, well, &c., is dispossession within the meaning of this article (Sabapathi *v.* Subraya, I. L. R., 3 Mad., 251). The occupation of a casual trespasser is not possession. If such a trespasser is immediately ejected, he cannot sue under this article. (7 Bomb., 82.)

| | | |
|---|---|---|
| 4.—Under Act No. IX of 1860 (*to provide for the speedy determination of certain disputes between workmen engaged in railway and other public works and their employers*), section one. | Six months ... | When the wages, hire or price of work claimed accrue or accrues due. |

No. 4. (No. 4, Act IX.) Magistrates empowered to decide such disputes have jurisdiction in case the amount in dispute does not exceed the sum of two hundred rupees. The special provisions of Act IX of 1860 have been extended to Nadya and the 24-Pergunnahs. This article does not apply to suits for wages, &c., in districts to which the Act has not been extended by Government.

| | | |
|---|---|---|
| 5.—Under the Code of Civil Procedure, Chap. XXXIX (*Of summary procedure on negotiable instruments*). | Six months ... | When the instrument sued upon becomes due and payable. |

No. 5. (No. 5, Act IX.) See secs. 532—537 of Act XIV of 1882. *Regular* suits on negotiable instruments are provided for by arts. 69 to 80.

*Part IV.—One year.*

| | | |
|---|---|---|
| 6.—Upon a Statute, Act, Regulation or Bye-law, for a penalty or forfeiture. | One year ... | When the penalty or forfeiture is incurred. |

No. 6. (No. 6, Act IX; and sec. 1, cl. 2, Act XIV.) This, like every other article, applies only when there are no periods specially prescribed

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part IV.—One year.*

by any special or local law. Penalties and forfeitures are incurred *chiefly* for offences against the Revenue laws, which, "generally speaking, are not recoverable in the Civil Courts, but are adjudicable by the Revenue Authorities, or in the criminal department." (See the Special Report of the Indian Law Commissioners, dated 26th February 1842.)

As to the forfeiture of goods bought and sold by inland traders in salt, &c., see 33 Geo. III., c. 52, sec. 137.

A suit for a penalty or forfeiture by, or on behalf of, the Secretary of State for India in Council, if not provided for by any special law, is governed by art. 149. The bye-laws passed by the Municipal Commissioners of a place under the authority of some legislative enactment have the force of law.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 7.—For the wages of a household servant, artisan or labourer not provided for by this schedule, No. 4. | One year ... | When the wages accrue due. |

No. 7. (No. 7, Act IX; sec. 1, cl. 2, Act XIV.) A mookhtear, a manager of a company, or a *taksildar* is not a household servant. (See Nitto Gopal *v.* Mackintosh, 6 W. R., 11; *In re* Ganges Steam Navigation Company, 2 Ind. Jur., N. S., 181; Oroon *v.* Ramanath, 10 W. R., 260. But cf. 5 W. R., S. C., 3.) The word 'servant' in this Act applies to a servant *ejusdum generis* as "labourer or artisan.' Servants in husbandry are labourers. But a man who cultivates another's land in consideration of the occupation of such land and of a portion of the produce thereof is not a labourer employed on wages (Audi *v.* Venkata, 2 Mad., 387). An *artist*, such as a portrait-painter, is not an artisan (see 2 Mad., 6). Even an *artificer*, such as a silversmith or saddler, is not an artisan. One who gives instructions in fencing and wrestling for a monthly fee is not a household servant or an artisan (8 Mad., 87). There is an idea of vulgarity attached to the term *artisan*. Suits for wages not falling under this article will generally be governed by art. 102. See also arts. 4 and 101. The date of dismissal of a servant is *not* the starting point of limitation (Kali Churn *v.* Mahomed, 6 W. R., S. C., 33). In the absence of a special contract, the wages of a servant on a fixed *monthly* salary accrue due at the end of each month (*ibid*). This article applies only to suits for wages *against the employer* (Siv Ram *v.* Turnbull, 4 Mad., 43).

| | | |
|---|---|---|
| 8.—For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house. | One year ... | When the food or drink is delivered. |

No. 8. (No. 8, Act IX; sec. 1, cl. 2, Act XIV.) A tavern is a house usually licensed to sell liquors in small quantities.

| | | |
|---|---|---|
| 9.—For the price of lodging. | One year ... | When the price becomes payable. |

No. 9. (No. 9, Act IX; sec. 1, cl. 2, Act XIV.) In the absence of contract or special custom, weekly, monthly or yearly payments fall due at the end of each week, month or year. Cf. art. 110.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

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ART. 10.

*Part IV.—One year.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 10.—To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract. | One year ... | When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold; or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered. |

No. 10. (No. 10, Act IX; sec. 1, cl. 1, Act XIV.) This article does not apply to a suit to enforce a preferential right of becoming the mortgagee or lessee of property. A suit to enforce a right of pre-mortgage is governed by art. 120 (Nath *v.* Ram, I. L. R., 4 All., 218, F. B.; Alu *v.* Sukhan, I. L. R., 3 All., 600, 630, F. B.) It has been held by a Full Bench of the Allahabad High Court, that the *sale* referred to in art. 10 must be an *absolute* one, having immediate effect and operation either by physical possession or by the creation of a title under an instrument duly registered (I. L. R., 4 All., 218). A pre-emptor objecting to a conditional sale that has become absolute would therefore have a limitation of six years under art. 120 (*ibid*). A right of pre-emption, founded on the Mahomedan law, does not attach to a lease, whether permanent or temporary (Babooram *v.* Nursing, 25 W. R., 43); nor to a conditional sale until it is completed or rendered absolute, (Gurudyal *v.* Teknarain, 2 W. R., 215; Buksha *v.* Tofer, 20 W. R., 216); nor to property sold in *execution*, except as laid down in sec. 310 of the Civil Procedure Code (Abdul *v.* Khellat, 10 W. R., 165).

There can be no *physical* possession of an *intangible* thing, such as a right to a reversion, or a right of redemption of property in the usufructuary possession of a mortgagee. (See the judgment of Stuart, C. J., in Jogeshur *v.* Jawahir, I. L. R., 1 All., 311, and the Transfer of Property Act; and compare sec. 1, cl. 1, of Act XIV of 1859, and art. 10, sched. ii of Act IX of 1871.) If *constructive* possession were in general sufficient, it would be impossible for intending claimants to know of the existence of rights inimical to their own (Beebee Fatima *v.* Gossain Gobind, 2 W. R., 5).

If a mortgagee *in possession* purchases the property, limitation runs from the date of the purchase (I. L. R., 2 All., 409). A conditional sale becoming absolute does not necessarily transfer the *possession* to the mortgagee. (See I. L. R., 4 All., 291.)

Taking visible and tangible possession of property, or materially enjoying the rents and profits thereof, is taking physical possession. What is often called *possession* in this country is *not actual or khas possession*, but the receipt of the rents and profits (Mullick *v.* Muleka, I. L. R., 10 Calc., 1112, 1124). It has been held by the Allahabad High Court that an undivided share of a puttidari estate under the management of the lumberdar is not susceptible of physical possession (Unkar *v.* Narain, I. L. R., 4 All., 24, F. B.)

Physical possession of the *whole* of the property sold must be taken before limitation commences to run under the first portion of this

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part IV.—One year.*

article. (See Bhole *v.* Imam, I. L. R., 4 All., 179; Jaikaran *v.* Gunga, I. L. R., 3 All., 175.)

There is nothing to prevent the pre-emptor from bringing his action immediately after the sale, and *before* the transfer of possession or the registration of the *kabala*. (See Lekranee *v.* Jankee, W. R., Gap No., 285.) Custom or contract may give a person a right of pre-mortgage or pre-lease. (See Ashik *v.* Mathura, I. L. R., 5 All., 187.) But such rights are not rights of *pre-emption*.

The date of endorsing the certificate of registration is the date of registration. (Sec. 60, Act III of 1877.) Every sale of intangible real property (which is incapable of physical possession) must, under sec. 54 of the Transfer of Property Act, be made by a registered instrument.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 11.—By a person against whom an order is passed under section 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order. | One year ... | The date of the order. |

No. 11. (Secs. 246 and 259, Act VIII of 1859.) *Reddendo singula singulis*, the words in the first column may be read thus: "By a person against whom an order is passed under secs. 280, 281, 282 of the Code of Civil Procedure, to establish his *right* to the property comprised in the order, or by a person against whom an order is passed under sec. 335 of the Code of Civil Procedure to establish his *right to the present possession* of the property comprised in the order." Reading the article thus, its language will exactly correspond to the provisions of sec. 283 and the second para. of sec. 335 of the Code of Civil Procedure. As to the difference between a suit to establish a right to present possession, and a suit to establish a right generally, see Rangoo *v.* Rikhivandas, 11 Bomb., 174.

Secs. 280, 281, 282 of the Code correspond to sec. 246 of Act VIII of 1859; and sec. 335 of the Code, to sec. 269 of Act VIII of 1859. Under Act VIII of 1859 the one year's limitation applied to suits of this class. Act IX of 1871 repealed this limitation-clause and did not re-enact it. The editor of the Indian Statute Book (Mr. Stokes) was of opinion that the general limitation of six years under art. 118, Act IX, applied to such suits. The Bombay High Court was of opinion that one year's limitation under art. 15 of that Act applied. The Calcutta High Court held that, in the case of claims to land, the twelve years' limitation applied. (See the cases quoted below.) Even now an order passed under sec. 246 or sec. 269 of Act VIII of 1859 is not governed by this article. (See p. 186, *supra*; and I. L. R., 9 Calc., 43, 163 and 230, and 12 C. L. R., 550.) The limitation prescribed for an ordinary suit to establish any right to property (six years or twelve years, as the case may be) applies to suits by persons against whom such an order has been passed. (See 1 Shome, 26; 2 Shome, 160; I. L. R., 4 Calc., 610; I. L. R., 9 Calc., 164, 230, and the cases cited therein.) The Bombay High Court, however, have held (see I. L. R., 4 Bomb., 21, 23, and 611) that, under Act IX of 1871, art. 15 (corresponding to art. 13 of this Act) applied to such a suit in respect of an order under sec. 246 of Act VIII of 1859.

*Part IV.—One year.*

This article applies even if the suit is for recovery of possession, or for confirmation of possession, of the property in respect of which an adverse order under sec. 281 has been made in the execution department (Shiboo *v.* Mudden, I. L. R., 7 Calc., 608; Brijo *v.* Ram, 21 W. R., 133). This article does not apply, unless the order is passed after making an investigation as prescribed by the Civil Procedure Code. (See Juggobundhoo *v.* Sachya, 16 W. R., 22; Venkapa *v.* Chenbarapa, I. L. R., 4 Bomb., 21; Rashbehary *v.* Buddun, 12 C. L. R., 550.) If the claim case is withdrawn or struck off for default, the article does not apply. (Kallu *v.* Brown, I. L. R., 3 All., 504; Bhika *v.* Sakarlal, I. L. R., 5 Bomb., 440. But cf. 21 W. R., 409, and 24 W. R., 411.) Where the Court disallows a claim by reason of the claimant not having given evidence in support of his claim, the order is an order to which the article applies (Sreemunto *v.* Syud Tajooddeen, 21 W. R., 409; Tripoora *v.* Ijjuthunessa, 24 W. R., 411). A mere refusal to postpone the sale of property attached in execution, without an investigation into the claim preferred, is not an order to which the article applies (Sah Mukkun *v.* Sah Koondun, 15 B. L. R., 228, P. C.; 24 W. R., 75). If no investigation is made on the ground that the claim is designedly or unnecessarily delayed, the article does not apply (Syed Mahomed *v.* Kanhya, 2 W. R., 263; I. L. R., 4 Bomb., 21; and p. 185, *supra*). The article does not also apply where no claim has been preferred in the execution department. (See Lalchand *v.* Sukharam, 3 Bomb., 139; Babu Pertab *v.* Babu Brojolall, 7 W. R., 253, F. B.) Where the claim to property attached is neither admitted nor rejected, but intimation of it is given at the time of sale, the article does not apply (Baboo Jodoonath *v.* Radhamonee, 7. W. R., 256, F. B.)

The person against whom an order is made under secs. 280, 281 or 282 is either the decree-holder or the claimant (Mannu *v.* Harsukh, I. L. R., 3 All., 233; Bhyrub *v.* Meer Abdool, 8 W. R., 93). The judgment-debtor is not bound by the order except where he is actually made a party to the proceeding (Imbichi *v.* Kakkemat, I. L. R., 1 Mad., 391). A party suing in his own character is not bound by an order against him in a representative character (Kalimohun *v.* Anundomoni, 9 C. L. R., 18). The date of the order is the date on which it is signed, not that on which it is *verbally* made (Bapu *v.* Laksman, 10 Bomb., 19).

Orders passed under secs. 280, 281, 282 of the Civil Procedure Code are *conclusive* on all the parties unless overruled by regular suit under this article. (See p. 103, note (10), *supra;* and I. L. R., 2 All., 455). But a purchase by the claimant of the judgment-debtor's property during attachment, though void and insufficient to entitle him to obtain an order of release, may be validated by the subsequent payment of the judgment-debt and consequent withdrawal of the attachment (Umesh *v.* Raj Bullabh, I. L. R., 8 Calc., 279). The claim in such a case is *not* considered as "disallowed *under* sec. 281."

Sec. 332 of the Civil Procedure Code allows a party against whom an order is passed under that section to bring a regular suit to establish his right to the present possession of property, but such a suit is not governed by this article. Even art. 13 does not apply to such a suit. (See I. L. R., 8 Mad., 82.) This article or any other article cannot save a suit brought within the time prescribed by it, from any bar arising out of any *other* provision of the law. Thus, if a person who has been out of possession of property for more than twelve years, puts in a claim under sec. 278 of the Civil Procedure Code, and his claim being rejected under sec. 281, he brings a suit to establish his right within one year of the order of

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part IV.—One year.*

ART. 12.

rejection, although the suit is not barred by art. 11, the plaintiff's right must be considered to have been extinguished by twelve years' dispossession. So again, if the property attached in execution is not released under sec. 281, Civil Procedure Code, but sold by order of the Court, the unsuccessful claimant must bring his suit within one year from the date of the order under sec. 281, and the subsequent sale will not give him a fresh start. (See Settiappan *v.* Sarat, 3 Mad., 220.) Even if the suit is instituted within one year of the sale under art. 12, it will be barred under art. 11, unless it is brought within one year of the rejection of the claim.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 12.—To set aside any of the following sales:— (*a*) sale in execution of a decree of a Civil Court: (*b*) sale in pursuance of a decree or order of a Collector or other officer of revenue; (*c*) sale for arrears of Government revenue, or for any demand recoverable as such arrears; (*d*) sale of a patni taluq sold for current arrears of rent. *Explanation.*—In this clause 'patni' includes any intermediate tenure saleable for current arrears of rent. | One year | ... When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought. |

No. 12. (No. 14, Act IX; sec. 1, cl. 3, Act XIV.) This article does not apply where the suit is not *substantially* a suit to *set aside a sale* (of one of the kinds mentioned in the article). Thus, a suit to recover property by setting aside a *certificate of sale*, which wrongly included rights and interests which had not been really sold, is not governed by this article (Baboo Pertaub *v.* Baboo Brojolall, 7 W. R., 253, F. B.) A suit to recover what has been taken in *excess* of what has been really sold is not a suit to *set aside* the sale (Musst. Shureefatunnessa *v.* Lachmi, 7 N. W. P., 288). Where the rights and interests of a judgment-debtor have been sold in execution, a *third* person suing to recover the property on the ground that the property or a share of it belongs to him, need not, and can not properly, claim to *set aside* the sale (Suryanna *v.* Durgi, I. L. R., 7 Mad., 259; Nothu *v.* Badridas, I. L. R., 5 All., 614; Tonoo *v.* Moheshur, 24 W. R., 302; Kripanath *v.* Nitokalee, 8 W. R., 358). A plaintiff suing in his own character is not bound by this article to sue to set aside a sale of property in execution against himself in a *representative* character (Kalimohun *v.* Anundmoni, 9 C. L. R., 18). Where the property *itself* (and not merely the interest of a particular person) has been sold, the sale must be set aside under this article before the property can be recovered, although the plaintiff was no party to the proceeding under which the sale took place (I. L. R., 7 Mad., 258).

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ART. 12.

*Part IV.—One year.*

The confirmation of a sale under the Civil Procedure Code binds the parties to the suit and the purchaser, and no regular suit lies to set aside such a sale on the ground of *irregularity* in publishing or conducting the sale. (Sec. 312.) But a sale in execution of a decree which is barred by limitation at the date of sale, may be set aside, if the *decree-holder* himself purchases at the sale. Such a case occurs when the judgment-debtor's plea that execution is barred by limitation is held to be a good plea on an appeal decided after the sale (Mina Kumari *v.* Juggat, I. L. R., 10 Calc., 220). The subsequent reversal of the decree, in execution of which property is sold, does not give the judgment-debtor a fresh start from the date of such reversal. If his suit to set aside the sale is maintainable, it must be brought within one year as provided in this article (Parshadi *v.* Mahomed, I. L. R., 5 All., 573).

*Bonâ fide* purchasers for valuable consideration and without notice are not in every case protected from having the sale set aside in a regular suit. Each case is to be decided upon its own merits in accordance with the principles of justice, equity, and good conscience (Abdool *v.* Nawab Raj, 9 W. R., 196, F. B.) The subsequent reversal of the decree *per se* does not render the sale invalid as against such a purchaser (Jan Ali, 10 W. R., 154.) As to *unconscionable* sales, see I. L. R., 11 Calc., 136, P. C.

Where the decree and the proceedings resulting therefrom are vitiated by fraud, a suit to set aside the sale, it has been held, is governed by art. 95 (Natha *v.* Natha, I. L. R., 6 All., 406). But cf. I. L. R., 3 Calc., 504; and I. L. R., 6 All., 75. In some cases the application of art. 12 in conjunction with sec. 18 will be sufficient to protect the plaintiff against a person who is guilty of the fraud. (See I. L. R., 2 Calc., 1, 8.) This article does not apply to an execution-sale held by a Court *without jurisdiction* (Sriman *v.* Yamuna, I. L. R., 5 Mad., 54; I. L. R., 7 Mad., 258), for such a sale is not merely voidable but void *ab initio.*

Where one of two judgment-debtors purchased the decree in the *name* of another person, and such purchase had the legal effect of satisfying the judgment-debt, a suit by the other judgment-debtor to recover his property which had been sold in execution at the instance of the benamidar, was held to be *substantially* a suit to set aside the sale. The sale was not *ipso facto void* by reason of the judgment-debt having been satisfied, but was only voidable at the instance of the plaintiff (Abul *v.* Abdool, I. L. R., 2 Calc., 98). Sec. 33 of Act XI of 1859 provides that the Civil Courts *shall not annul* a revenue-sale except upon the ground of its having been made contrary to the provisions of that Act, and then only under certain conditions. But it has been held that, where nothing was due from the plaintiff which could legally be recovered from him as an arrear of revenue, the sale of his property by the Collector was totally *without jurisdiction*, and could be set aside by the Civil Court, although there was no irregularity in publishing and conducting the sale, and no appeal to the Commissioner against it (Byjinath *v.* Lalla, 10 W. R., F. B., 66). Such a sale is no legal sale, and is absolutely void (12 W. R., 276, 311; 13 W. R., 381).

In order that this article may apply, the revenue-sale must be a *real* sale for arrears, and not merely a device—part of the machinery as it were—to effect a *fraud.* In such a case the sale may, as between the plaintiff and the parties to the fraud, be considered as a private sale (Nawab Sidhee *v.* Ojoodhyaram, 5 W. R., P. C., 83, 88). The plaintiff suing for relief on the ground of such fraud may maintain a suit, if not to set aside the sale, to have the property *reconveyed* to him. (See Bhoobun *v.* Ram Soonder, I. L. R., 3 Calc., 300; Amiroonnissa *v.* The Secretary of

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part IV.—One year.*

State, I. L. R., 10 Calc., 63.) Art. 95 may apply to a suit of this description. (See I. L. R., 3 Calc., 300.) In some cases the twelve years' rule has been applied. (See I. L. R., 3 Calc., 504; and I. L. R., 6 All., 15.)

Cl. (*b*).—The order mentioned in this clause means an order of the nature of a decree, or one made by the Revenue Officer in his *judicial* capacity (Sakharam *v.* The Collector, 8 Bomb., F. B., 219). A sale of land by a non-judicial order of the Collector is not governed by the one year's limitation under this article (*ibid*).

Cl. (*c*).—For "demands recoverable as arrears of revenue," see Act VII of 1868, B. C., and sec. 5, Act XI of 1859.

Cl. (*d*).—A sale of a putni or other intermediate tenure for arrears (of rent) other than those of the *current* year is not governed by this article.

As to when a revenue-sale becomes final and conclusive, see sec. 27, Act XI of 1859, as modified by secs. 2 and 4 of Act VII of 1868, B. C.; and I. L. R., 8 Calc., 329. As to when it is *necessary* to *set aside* a sale, see the notes under arts. 12, 13, and 91.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 13.—To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit. | One year ... | The date of the final decision or order in the case by a Court competent to determine it finally. |

No. 13. (No. 15, Act IX; sec. 1, cl. 5, Act XIV.) Where the simple question raised is whether the Civil Court's summary decision or order under any particular law was rightly given or made, and the suit is *merely* to set aside the decision or order, such suit, if maintainable, must be governed by this article. (See Loknarain *v.* Ranee Myna, 7 W. R., 199, F. B.) Where the Court has no jurisdiction, its decision or order will bind no one, and it will not be necessary to sue to set it aside (Wooma *v.* Ram Buksh, 16 W. R., 11, 13). A suit which is *virtually and substantially* a suit to set aside a summary decision or order (a decision or order in a miscellaneous proceeding) is also governed by this article, even if the plaint does not *in terms* seek to set aside such decision or order. The test is, whether the summary decision or order could be set up as a bar or impediment to the maintenance of the suit. If it could, then it might be said that the suit is brought in reality, though not in words, to set aside the summary decision or order (Durgaram *v.* Nundocoomar, 1 Shome, 26, citing Loknarain's case in 7 W. R., 199, F. B.) But where the law expressly provides that, notwithstanding the summary order, a suit may be brought to establish the right, it is not necessary to *set aside* the order (*ibid*). Secs. 283, 332 and 335 of the Civil Procedure Code, sec. 9 of the Specific Relief Act, and sec. 17 of Act XIX of 1841 expressly allow such suits to be brought. Suits in respect of orders referred to in secs. 283 and 335 of the Procedure Code are, however, governed by another special article, No. 11. But a suit to establish right after an adverse order under sec. 9 of the Specific Relief Act (see p. 331, *supra*) or Act XIX of 1841 (7 W. R., 199, F. B.) is not governed by any *special* rule of limitation, and may be brought within the *ordinary period*. It has also been held, that an order under Act XXVII of 1860 is no bar to a suit upon *title* though brought after the one year allowed by this article (Kalee *v.* Srimati Kylasmoni, 8 W. R., 126). In a suit to recover property which has been improperly sold by the

guardian of an infant under an order of the Civil Court (*vide* sec. 18, Act XL of 1858), it is not necessary to *set aside* such order (Sikher *v.* Dulputty, I. L. R., 5 Calc., 363). It was suggested by Sir B. Peacock, C. J., and held by Norman, J., that a suit to recover money that has been erroneously paid away to a rival decree-holder under sec. 270 of Act VIII of 1859 should be treated as a suit to recover the money by *setting aside* the order of the Court in the execution department (Gogaram *v.* Kartik, 9 W. R., 514; Wooma *v.* Rambuksh, 16 W. R., 11). But sec. 295 of Act XIV of 1882 expressly enacts that if the assets realized in execution be paid by the Court to a person not entitled to receive the same, any person so *entitled* may *sue* such person to compel him to refund the assets. The order of the Court is carried into effect once for all, but is no impediment to a regular suit for the refund; and for the reasons stated by Markby, J., in 1 Shome, 26, it may be fairly contended that it is not necessary to *set aside* such orders. It should be observed, however, that the Bombay High Court considered an order under sec. 246 of Act VIII of 1859 as a *final* bar of the disputed right, and that it was *necessary* to set aside such order. (See I. L. R., 4 Bomb., 611.) The same remarks might apply to orders under sec. 332, Act XIV of 1882, but there is this difference that, orders under that section are *declared* to be *final*, unless contested in a regular suit. Where a Judge or a Collector does not entertain an application, or *refuses* to pass an order on the ground that he has no jurisdiction, this article cannot apply (Musst. Momudannessa *v.* Mahomed Ali, 1 W. R., 40; Kristodass *v.* Ramkant, I. L. R., 6 Calc., 142). An order *passed without jurisdiction* need not be *set aside* (Debi Persad *v.* Jafar Ali, I. L. R., 3 All., 40; see also Ram Kissen *v.* Bhowani, I. L. R., 1 All., 333, 336, F. B.) Where a Court having jurisdiction has passed an order against which the law allows no appeal, limitation will run from the date of such order and not from the date of the order passed on appeal (Olumonissa *v.* Buldeo, 7 W. R., 151). An order in an *execution*-proceeding is an order in a *suit* (I. L. R., 8 Mad., 82).

| Description of suit. | Period of limitation. | Time from which period begins to run. |
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| 14.—To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for. | One year ... | The date of the act or order. |

No. 14. (No. 16, Act IX.) See notes to preceding article. It has been held that the Civil Court has no power to *set aside* an order passed under the Land Registration Act, VII of 1876, B. C. Besides, sec. 89 of that Act expressly allows a regular suit for possession of, or for a declaration of right to, immoveable property, notwithstanding any orders under the Act. Such a suit is, therefore, not governed by this article (Luchmon *v.* Kanchun, I. L. R., 10 Calc., 525). When the suit is not merely or necessarily a suit to *set aside* an official act of the Collector, but one to recover immoveable property, this article does not apply (Krishnamma *v.* Acharyya, I. L. R., 2 Mad., 306). Under Act XIV of 1859 a suit merely to set aside an official act was not expressly provided for, but was governed by the six years' limitation under sec. 1, cl. 16 (Kebul Ram *v.* The Government, 5 W. R., 47).

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part IV.—One year.*

| ARTS. | Description of suit. | Period of limitation. | Time from which period begins to run. |
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| 15—17. | 15.—Against Government to set aside any attachment, lease or transfer of immoveable property by the revenue authorities for arrears of Government revenue. | One year ... | When the attachment, lease or transfer is made. |

No. 15. (No. 17, Act IX; sec. 1, cl. 4, Act XIV.) When a Ghatwal becomes a defaulter, it is in the power of Government to make over his tenure to another person on the condition of making good the arrear due; or to transfer it or to dispose of it in some other form. (Sec. 5, Reg. XXIX of 1814.) A suit to set aside such a transfer is governed by this article (Chittro *v.* The Assistant Commissioner of the Sonthal Pergunahs, 14 W. R., 203).

Under the North-Western Provinces Land Revenue Act, XIX of 1873, secs. 150 and 154, the defaulter's patti or mahal may be attached and taken under direct management. A share or *patti* of a *mahal* may also be transferred for a limited time to a solvent co-sharer in the *mahal*, on condition of his paying the arrear due from the *patti*. (Sec. 157).

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| | 16.—Against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears. | One year ... | When the payment is made. |

No. 16. (No. 18, Act IX; sec. 1, cl. 4, Act XIV.) When proceedings are taken under Chap. V of the North-Western Provinces Land Revenue Act, the defaulter may pay the amount of arrears claimed, *under protest*, to the officer taking such proceedings, and upon such payment the proceedings (arrest, distress, attachment, &c.) shall be stayed, and such defaulter may sue the Government in the Civil Court for the amount so paid. (Sec. 189, Act XIX of 1873.) As to whether an unsuccessful appeal to the higher Revenue Authorities against an order for the payment of revenue at a higher rate, and the subsequent payment of the alleged excess without any *actual* protest, make the payment a "payment under protest," see Kebalram *v.* The Government, 5 W. R., 47. If money has been paid under protest for several years, only one year's amount can be recovered under this clause. (5 W. R., 47; 11 Bomb., 1.)

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| | 17.—Against Government for compensation for land acquired for public purposes. | One year ... | The date of determining the amount of the compensation. |

No. 17. (No. 19, Act IX.) This article does not, evidently, apply to suits against a person who may have received from Government the whole or any part of the compensation awarded under Act X

*Part IV.—One year.*

of 1870. (See sec. 40 of the Act.) It has been held that art. 120 applies to such a suit (Roy Nind *v.* Mir Abu, 5 C. L. R., 45).

The Government is *not* considered as a *depositary* of the money till such time as it is made over to the owner of the land. (11 W. R., 1.) The suit against Government must be brought within one year.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 18.—Like suit for compensation when the acquisition is not completed. | One year ... | The date of the refusal to complete. |

No. 18. (No. 20, Act IX.) When the Government declines to complete the acquisition, the Collector is bound to determine the amount of compensation due for the damage (if any) done to the land (by the clearing, digging or marking it out) and to pay such amount to the preson injured. (See sec. 54, Act X of 1870.)

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| 19.—For compensation for false imprisonment. | One year ... | When the imprisonment ends. |

No. 19. (No. 21, Act IX.) See p. 241 (note), *supra*. "False imprisonment."—Unlawful detention of the person, *i.e.*, without sufficient authority. The illegal execution of a lawful warrant or process may amount to false imprisonment. The article applies to suits for *compensation*—not for removal of the injury.

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| 20.—By executors, administrators or representatives under Act No. XII of 1855 (*to enable executors, administrators or representatives to sue and be sued for certain wrongs*). | One year ... | The date of the death of the person wronged. |

No. 20. (No. 12, Act IX.) This article applies to certain suits *by* executors, &c. No. 33 applies to similar suits *against* executors, &c. Act XII of 1855 enabled executors, &c., to sue and be sued for damages for certain torts which, according to the law then in force, did *not survive* to, or against, such executors, &c. A suit for the value of an elephant wrongly sold by a deceased person, or for recovery of money due by a deceased agent, against the representative of the deceased, is not governed by Act XII of 1855 (Sreemutty Chundermoni *v.* Santomoni, 1 W. R., 251; Nujuf *v.* Patterson, 2 N., W. P., 103).

A suit *by* executors, &c., of the *person wronged*, under Act XII of 1855, lies only when such wrong has caused *pecuniary loss* to the estate of such person; but a suit *against* executors, &c., of a deceased *wrongdoer* lies, though no pecuniary loss was occasioned by it to the plaintiff (Gokul Chunder *v.* Musst. Burreck, 2 Hay, 325). Causes of action for defamation, assault or other personal injuries not causing the death of the party do not survive to and against executors, &c. A cause of action to sue for restitution of conjugal rights or for a divorce does not also survive to executors, &c. (See sec. 268, Act X of 1865, and sec. 89, Act V of 1881.)

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SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part IV.—One year.*

| ARTS. | Description of suit. | Period of limitation. | Time from which period begins to run. |
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| 21—25. | 21.—By executors, administrators or representatives under Act No. XIII of 1855 (*to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong*). | One year ... | The date of the death of the person killed. |

No. 21. (No. 13, Act IX.) No action or suit was formerly maintainable against a person who, by his wrongful act, neglect or default, caused the *death* of another person. Act XIII of 1855 renders the wrongdoer answerable in damages for the injury so caused by him.

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| | 22.—For compensation for any other injury to the person. | One year ... | When the injury is committed. |

No. 22. (No. 22, Act IX; sec. 1, cl. 2, Act XIV.) Injuries to personal liberty, to reputation, and to life, are separately provided for. This article relates to immediate or consequential injuries affecting a man's limbs or body or health. Injuries caused by the unskilfulness of a physician or surgeon may come under this article.

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| | 23.—For compensation for a malicious prosecution. | One year ... | When the plaintiff is acquitted, or the prosecution is otherwise terminated. |

No. 23. (No. 23, Act IX.) The prosecution must terminate in *favor* of the plaintiff (Bhyrub *v.* Mohendro, 13 W. R., 118), as in an acquittal, a discharge, or a withdrawal of the charge. A malicious and illegal arrest in a *civil* case does not fall under this article. Art. 19 may apply to such a case.

Where there has been no prosecution, and the complaint made is the only act done, the date of the complaint is that of the wrong (Muduirapa *v.* Fakirapa, I. L. R., 7 Bomb., 427, 430).

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| | 24.—For compensation for libel. | One year ... | When the libel is published. |

No. 24. (No. 24, Act IX; sec. 1, cl. 2, Act XIV.) Limitation runs from the time when the libel is published, not when the plaintiff becomes aware of it (Robert and Charriol *v.* Lombard, 1 Ind. Jur., N. S. 192). Limitation does not run from the time when the libel is *first* published. Proof of the sale of one copy of the libel within one year of the suit will negative the plea of limitation (Duke of Brunswick *v.* Harmer, 14 Q. B., 185, cited in Darby and Bosanquet, p. 29). A libel is some writing, picture or the like, containing defamatory matter.

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| | 25.—For compensation for slander. | One year ... | When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results. |

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part IV.—One year.*

No. 25. (No. 25, Act IX; sec. 1, cl. 2, Act XIV.) This probably includes "slander of *title*."

To call a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or to say of a Magistrate that he is partial and corrupt, is sufficient to give a cause of action *without* special damage. Impeaching a man of some punishable crime, or charging him with having a disease tending to exclude him from society, is also actionable *per se*. (See Stephen's Commentaries, Vol. III.)

If the words are not actionable in themselves, time runs from the date when the special damage complained of results. It is apprehended that the plaintiff cannot bring a subsequent action for subsequent damage. (See Lamb *v.* Walker, 3 Q. B. D., 389, 395.) This is not a case of a continuing wrong under sec. 23. It comes under sec. 24. (See p. 222, *supra.*)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
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| 26.—For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter. | One year ... | When the loss occurs. |

No. 26. (No. 27, Act IX.) The English theory on which the remedy for such a wrong as that of seduction of a young woman is based is a theory which has no place in the law of this country. The action is founded upon the loss of *service* of the daughter, in which service the parent is supposed by a *fiction* to have a legal right or interest (Rar Lal *v.* Tula Ram, I. L. R., 4 All., 97). The action is *in substance* brought to repair the outrage done to parental feeling. (Stephen's Commentaries, Vol. III.) A master standing *in loco parentis* may, according to English law, maintain a similar action for debauching his servant. (*Ibid.*)

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| 27.—For compensation for inducing a person to break a contract with the plaintiff. | One year ... | The date of the breach. |

No. 27. (No. 28, Act IX.) The inveigling or hiring the plaintiff's servant which induces a breach of contract comes under this article. Inducing ryots under contract with the plaintiff to cultivate indigo to break that contract falls under this article. Under Act XIV of 1859, the six years' rule applied to such cases (Meer Mahomed *v.* Forbes, 8 W. R., 257).

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| 28.—For compensation for an illegal, irregular or excessive distress | One year ... | The date of the distress. |

No. 28. (No. 29, Act IX.) Distress is a taking without legal process of a personal chattel for the redressing an injury, the performance of a duty, or the satisfaction of a demand. Distresses may be made on cattle damage-feasant, and also for rents, rates, taxes, &c.—Wharton.

The distraint of crops for rents, and suits in respect of such distraint in Bengal are *specially* provided for in Act VIII of 1869, B. C. (See secs. 97—100.) This article does not govern suits for the *re-delivery* (replevin) of goods taken unlawfully in distress.

ACT XV OF 1877.

ARTS. 29—32.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part IV.—One year.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 29. For compensation for wrongful seizure of moveable property under legal process. | One year ... | The date of the seizure. |

No. 29. (No. 30. Act IX.) Limitation commences to run from the date of the *seizure* of moveable property, and not from the date of the *release* from attachment, &c. (Ram Sing *v.* Bhadro, 24 W. R., 298. See p. 222, *supra*).

It has been held that *money* is "moveable property," and that a suit to recover money wrongly taken in execution, with or without damages in the shape of interest, is a suit for *compensation* within the meaning of this article (Jaggevan *v.* Gulam, I. L. R., 8 Bomb., 17). When injury is caused by an *injunction* wrongfully obtained, art. 42 applies.

*Part V.—Two years.*

| | | |
|---|---|---|
| 30.—Against a carrier for compensation for losing or injuring goods. | Two years ... | When the loss or injury occurs. |
| 31.—Against a carrier for compensation for delay in delivering goods. | Ditto ... | When the goods ought to be delivered. |

Nos. 30 & 31. (Nos. 36 & 37, Act IX.) These articles apply to private carriers as well as to common carriers, whether by land or by water. It has been held that where the liability of the carrier arises out of a *contract* respecting the delivery of goods, a suit for compensation against him is governed by art. 115, and that these articles apply where there is no such contract, and loss or injury to goods arises from a tort—*e. g.*, from alleged negligence or want of proper care on the part of the carrier (The B. I. S. N. Co. *v.* Hajee Mahomed, I. L. R., 3 Mad., 107; Kalu Ram *v.* The M. R. Co., I. L. R., 3 Mad., 240).

From the mere fact of non-delivery of the goods on a certain date, it cannot be inferred that the *loss* of the goods occurred on that date. If the carrier claims the benefit of this article, *he* ought to prove the date of the loss, supposing the plaintiff has given *primâ facie* evidence that his suit is not barred by limitation (Mohon Sing *v.* H. Conder, I. L. R., 7 Bomb., 478).

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| 32.—Against one who, having a right to use property for specific purposes, perverts it to other purposes. | Two years ... | When the perversion first becomes known to the person injured thereby. |

No. 32. (No. 38, Act IX.) The words "*first* becomes known" occur in this article; and the words "*first* became known," in sec. 18; the words "*first* become known," in art. 114; the words "*first* learns," in art. 48; and the words "becomes known," in arts. 90, 91, 92, 95 and 96. See p. 225, *supra*.

This article also applies to actions of *tort* only, and not to suits in respect of perversion, when such perversion amounts to a breach of a *covenant* subject to which a tenant holds the demised premises (Kedar Nath *v.* Khetter Paul, I. L. R., 6 Calc., 34).

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part V.—Two years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 33.—Under Act No. XII of 1855 (*to enable executors, administrators or representatives to sue and to be sued for certain wrongs*) against an executor, administrator or other representative. | Two years ... | When the wrong complained of is done. |

No. 33. (No. 39, Act IX.) See notes to art. 20.

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|---|---|---|
| 34.—For the recovery of a wife. | Two years ... | When possession is demanded and refused. |
| 35.—For the restitution of conjugal rights. | Ditto ... | When restitution is demanded and is refused by the husband or wife being of full age and sound mind. |

Nos. 34 and 35. (Nos. 41 and 42, Act IX.) When a third person detains the wife, a suit for *recovery* of the wife lies against such person. A decree in a suit for restitution of conjugal rights is executed under sec. 260 of the Civil Procedure Code. A decree in a suit for the recovery of a wife is executed under sec. 259 of the Code. It has been held by a Full Bench of the Punjab Chief Court that, so long as the relation of husband and wife subsists, a suit against the wife for the restitution of conjugal rights is not barred under this article (*vide* sec. 23), and that a suit for the recovery of a wife may be brought within two years of *any* demand and refusal. See Rivaz, 2nd Ed., p. 102. Limitation runs from date of "demand and refusal," not from date of "the *first* demand and refusal." Time does not run from the refusal of a minor or insane wife. The refusal from which limitation runs must be an *absolute* refusal. Suits for restitution of conjugal rights under the Indian Divorce Act are not governed by this article. (See sec. 1, and the notes under it.)

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| 36.—For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for. | Two years ... | When the malfeasance, misfeasance or non-feasance takes place. |

No. 36. (No. 40, Act IX.) Suits for compensation for *torts* not *specially* provided for in this schedule are governed by this general article. Nos. 65, 115, and 116 are the general articles for suits for compensation for breaches of contracts; No. 49 is the general article for suits for specific moveable property; No. 80 for suits on bills, notes and bonds. No. 144 for the possession of *immoveable* property; and No. 120 for all *other* suits. No. 149 applies to all suits *by Government*. For an explanation of the

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part V.—Two years.*

ARTS. 37, 38.

terms malfeasance, misfeasance, and non-feasance, see the notes under sec. 23.

Where on a complaint of theft of grain against the plaintiff, the Magistrate, of his own motion, attached the grain and referred the parties to a suit in the Civil Court to establish their right, and the complainant's suit was dismissed by the Civil Court, and the grain restored to the plaintiff in a damaged state, it was held that plaintiff's suit for damages for wrongful detention of his grain was at best governed by art. 36, and that limitation commenced to run at the latest from the date of attachment (Mudvirapa *v.* Fakirapa, I. L. R., 7 Bomb., 427).

A suit for the value of standing crops carried away by the landlord on the strength of an ejectment-decree subsequently reversed has been held to be a suit for mesne profits under art. 109 (Shurnomoyee *v.* Patarri, I. L. R., 4 Calc., 625). An ordinary suit for compensation for wrongfully carrying away standing crops has been held to be governed by art. 36 (Pandah *v.* Jeunudi, I. L. R., 4 Calc., 665). Justice Field, however, in an unreported case, held, that as such carrying away is preceded by a trespass on immoveable property, it may be treated as matter in aggravation of the trespass, and as such governed by art. 39. Whatever injury a trespasser causes to the property while he is trespassing, or which results immediately from his acts, is matter in aggravation of the trespass, and as such is proper for the consideration of the Court when estimating the damages to be awarded for the trespass. (Phear on Rights of Water, p. 100. See also Form of suit for trespass, sched. iv, Act XIV of 1882; and Naasimma *v.* Ragupathi, I. L. R., 6 Mad., 176.) As to the time when the cause of action for a tort generally arises, see p. 221, *supra*.

*Part VI.—Three years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 37.—For compensation for obstructing a way or a watercourse. | Three years .. | The date of the obstruction. |
| 38.—For compensation for diverting a watercourse. | Ditto ... | The date of the diversion. |

Nos. 37 & 38. (Nos. 31 & 32, Act IX.) Suits for *injunctions* for the removal of obstructions, &c., are not governed by these articles.

Where the obstructions are in the nature of continuing nuisances, the cause of action is renewed *de die in diem* so long as the obstruction is allowed to continue. (See sec. 23, and Rajrup Koer *v.* Abul Hossein, I. L. R., 6 Calc., 394, 404.) If there was any distinction under Act XIV of 1859 as to suits for *removal* of continuing obstructions and suits for *damages* for such obstructions (see 5 Mad., 6, 24; and 3 Mad., 111, 113), such distinction does not exist under the present law. Sec. 23 applies to *both* classes of suits. Even as regards a claim for damages only, a continuing obstruction gives rise to a fresh cause of action as fresh damage results from it. (3 Mad., 111, 113.)

Obstructions and disturbances of *other* easements,—*e. g.*, of the right to light or air,—are not specially provided for. Art. 36 will apply to suits for *compensation* in *such* cases. An obstruction to the migration of fish to and fro in plaintiff's *julkur* is not an obstruction to a watercourse. (See Moharanee Surnomyee *v.* Degumbary, 2 Shome, 93.) Independently

*Part VI—Three years.*

of any question of *limitation* properly so called, no *right* to an easement can be *established* under sec. 26, if its enjoyment was *interrupted* two years before the institution of the suit. If the plaintiff cannot establish an *immemorial* right, or a right created by *grant*, &c., he must sue within *two* years of the *interruption*. See pp. 410—414, 428, *supra*.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 39.—For compensation for trespass upon immoveable property. | Three years ... | The date of the trespass. |

No. 39. (No. 43, Act IX.) See the notes under art. 36.

A trespass upon land is committed by entry on the same without lawful authority, and is in English law called trespass *quare clausam fregit* as distinguished from trespass to another's goods or person. A man is answerable not only for his own trespass, but for that of his *cattle* also. (Stephen's Commentaries, Vol. III.) An act committed *beyond the bounds* of the property affected by it may be a nuisance, but is not a trespass. (Phear, 101.) The trespass continues so long as the unlawful entry lasts (I. L. R., 6 Mad., 171, 178). Suits to *recover* immoveable property from a trespasser are governed by art. 142 (I. L. R., 6 Bomb., 580).

Fishing in plaintiff's tank or lake without his permission is an act of trespass only, when the plaintiff himself is not prevented from fishing there (Lukhimoni *v.* Koruna, 3 C. L. R., 509). But the acts of the defendant in taking fish from the tank or lake cannot be considered as successive acts of trespass, if they appear to have been exercised continuously under a claim of right. They must be considered as a dispossession by the defendant of the plaintiff's right *pro tanto* (Parbutty *v.* Mudho, I. L. R., 3 Calc., 276).

A trespass when it amounts to an *ouster* of the possessor of the property, cannot be treated as a "continuing wrong" under sec. 23.

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| 40.—For compensation for infringing copyright or any other exclusive privilege. | Three years ... | The date of the infringement. |

No. 40. (No. 11, Act IX; sec. 1, cl. 2, Act XIV.) A "patent right" in respect of a new manufacture is an exclusive privilege like "copyright." An exclusive right of *ferry* is also an exclusive privilege, but not of a like nature with "copyright." A suit in respect of a right of ferry is therefore not governed by this article. (See Rules of construction.)

The taking of an *account* of profits made by the defendant is only a mode of *compensating* an inventor for the infringement of his privilege. A suit for such an *account* is governed by this article (Kinmond *v.* Jackson, I. L. R., 3 Calc., 17).

| | | |
|---|---|---|
| 41.—To restrain waste ... | Three years ... | When the waste begins. |

No. 41. Suits for *compensation* for waste are governed by the general provisions of art. 36. Illustrations (*m*) and (*n*) under sec. 54 of Act I of 1877 give instances of suits to *restrain* waste by Hindu widows and undivided coparceners.

Waste is any considerable spoil or destruction in houses, woods, gardens, trees, lands, &c., by a lessee, a life-tenant, a mortgagor or

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

mortgagee in possession, a co-sharer, &c. The conversion of arable lands into *bhiti* lands, and *vice versâ*, may amount to waste. (Stephen, Vol. III; Wharton.).

According to the English law, *waste* is an injury to *real* property. For an instance of waste of personal property, see Hurry *v.* Apoorna, 6 Moore's I. A., 433.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 42. For compensation for injury caused by an injunction wrongfully obtained. | Three years ... | When the injunction ceases. |

No. 42. (No. 86, Act IX.) An award of damages under sec. 497, Act XIV of 1882, for an *ad-interim* injunction wrongfully obtained, bars any suit for compensation in respect of the issue of such injunction.

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|---|---|---|
| 43.—Under the Indian Succession Act, 1865, Section 320 or 321, *or under the Probate and Administration Act*, 1881, *section* 139 *or* 140,* to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets. | Three years ... | The date of the payment of distribution. |

No. 43. A creditor or other claimant against the estate of a deceased person may follow the assets or any part of them in the hands of the persons who may have received the same from the executor or administrator.

| | | |
|---|---|---|
| 44.—By a ward who has attained majority, to set aside a sale by his guardian. | Three years ... | When the ward attains majority. |

No. 44. See I. L. R., 4 Calc., 523, and pp. 255, 256, *supra*.

A "sale" does not include a mortgage or lease, but art. 91, read with sec. 7, will apply to suits to set aside *instruments* of mortgage or lease, executed by the guardian of a ward. (See Ramansar *v.* Raghubar, I. L. R., 5 All., 490.)

Where the sale is *ab initio* void, as where a guardian or manager appointed under Act XL of 1858 sells his ward's immoveable property without an order of the District Judge previously obtained, it is not necessary to set aside the sale. A suit for recovery of the property against the purchaser in such a case will be governed by the twelve years' rule of limitation. As to suits *for recovery of property generally*, see notes under art. 91, and I. L. R., 5 All., 490.

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|---|---|---|
| 45.—To contest an award under any of the following Regulations of the Bengal Code:— VII of 1822, IX of 1825, and IX of 1833. | Three years ... | The date of the final award or order in the case. |

* *Vide* Act V of 1881, sec. 156.

*Part VI.—Three years.*

No. 45. (No. 44, Act IX; sec. 1, cl. 6, Act XIV.) No. 45 applies to suits by *any person*, whether bound by the award or not. No. 46, to suits by a *party bound* by the award. It was held by the late Sudder Court at Calcutta, that as an auction-purchaser at a revenue-sale was not the legal representative of the former proprietor in the property sold, the rule of limitation fixed in Act XIII of 1848 (to which this article corresponds) did not apply to a claim preferred by such a purchaser to contest the award of the Revenue Officers, though such award was binding on the former proprietor. The framers of Act XIV of 1859 (see sec. 1, cl. 6) introduced words to shew that the law was to be regarded as binding on all parties whenever and under whatever title they might have acquired the property affected by the award of the Revenue Officers. (See the Report of the Select Committee on the Limitation Bill, dated 8th January 1859.) This change in the wording of the law was not considered in Pureeag *v.* Shib Ram, 3 W. R., 165, as that case was decided under the old law. But in Mohima *v.* Rajcoomar (10 W. R., 22), Sir Barnes Peacock, C.J., points out that, now, a person is not entitled to ask the Court to rectify or set aside an award in a suit commenced more than three years after the date of the award, whether he is legally bound by the award or not.

The Regulations referred to in this and the following article relate to the settlement of lands, &c., and empower the Revenue Authorities to take judicial cognizance of certain claims and disputes respecting lands, &c.

A *thakbust*-survey-award relating to boundaries, in Bengal, is treated as an award under Reg. IX of 1825. (See Rajah Sahib Pershad *v.* Rajendro Kishore, 12 W. R., P. C., 6, 18.) An award under these Regulations is an *adjudication* of some *dispute* after the parties have had notice of the proceedings. (See 3 W. R., 7, and 11 W. R., 389; Thompson, p. 115.) It must be a judicial act of the Revenue Officer (I. L. R., 3 All., 738).

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 46.—By a party bound by such award to recover any property comprised therein. | Three years ... | The date of the final award or order in the case. |

No. 46. (No. 45, Act IX; sec. 1, cl. 6, Act XIV.) See the notes to art. 45. In a suit by A against B, A is not bound by an award obtained by A and B against C (Komul *v.* Bissonath, W. R., Spl. No., p. 128, F. B.) This article applies only to suits by the *parties* to the award (Kanto *v.* Asad Ali, 5 C. L. R., 452). A purchaser at a revenue-sale, not being the legal representative of any of the parties to the award, is not *bound* by the award. A suit by a person in possession to have his title confirmed is not a suit to *recover* property within the meaning of this article. A person who remains in possession for three years after the making of the revenue award is not barred by this article from maintaining a suit to *confirm* his title. As the award does not determine the title of the parties, it is not necessary to set aside the award in such a case (Mohima *v.* Rajcoomar, 10 W. R., 22, 24). Even if the plaintiff is actually dispossessed two years *after* the award, he is bound to sue within three years of the award. The ruling in Mozuffer Ali's case (10 W. R., 71) is opposed to the wording of the law. (Thomson, p. 114.)

A temporary settlement of lands by the Collector, where there has been no award *against* the plaintiff, is no bar to his claim for a perma-

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ART. 47.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

nent settlement. If the *right* of the *malik* is anyhow recognized by the Collector, the possession of the person with whom a temporary settlement is made is not adverse to the *malik* (Kristo *v.* Kashee, 17 W. R., 144; Bisseshuree *v.* Kalee, 18 W. R., 198; Kristo *v.* Shama, 22 W. R., 520; see also I. L. R., 10 Calc., 697, 709).

Where the law *allows* an appeal to the superior Revenue Officers, the period of limitation runs from the date of the final order in the case. The fact that the appeal was summarily dismissed or that the merits of the case were not entered into, does not make the order the less a final order (Krishna *v.* Mahomed, 10 W. R., 51). But where A and B are similarly affected by an award, and A only appeals, B cannot compute the period of limitation under this article from the date of the order on A's appeal. The three years are to be computed from the date when the award becomes final, so far as the plaintiff is concerned (Tulsiram *v.* Mahomed, 10 W. R., 48).

A suit which is within time under this article may, nevertheless, be barred by art. 142 or 144. (See 8 W. R., 209; 10 W. R., 249.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 47.—By any person bound by an order respecting the possession of property made under the Code of Criminal Procedure, Chapter XL, or the Bombay Mámlatdars Courts Act, or by any one claiming under such person, to recover the property comprised in such order. | Three years ... | The date of the final order in the case. |

No. 47. (No. 46, Act IX; sec. 1, cl. 7, Act XIV.) Orders passed under Chap. XII of the Criminal Procedure Code of 1882 are, by virtue of sec. 3 of the Code, governed by this article. (See p. 186, *supra.*)

A person who was no party to the proceeding before the Magistrate, and who does not claim under any party to such proceeding, is not bound to sue within three years under this article. The dictum in Lekhraj Roy's case (14 W. R., 395) that the zemindar is bound by an order passed against his ijaradar can hardly be supported.

Orders under sec. 530, Act X of 1872, or sec. 145, Act X of 1882, are governed by this article. An order under sec. 147 of Act X of 1882 relating to easements is probably not governed by this article. Orders under secs. 532 and 534 of Act X of 1872, specially those under the latter section, would seem to be included in "orders respecting the possession of property under Chap. XL of Act X of 1872."

Where the Magistrate is unable to satisfy himself as to which party is in possession, or where he decides that neither party is in possession, and he *attaches* the property under sec. 531 of Act X of 1872, or sec. 146, Act X of 1882, his order is not "an order respecting the *possession* of property" (Akilandun *v.* Periasami, I. L. R., 1 Mad., 309).

The article can only apply where the possession of the defendant was confirmed by the Magistrate. It does not apply in favor of a party who subsequently succeeds, by a regular suit, in ousting the person whose

*Part VI.—Three years.*

possession was so confirmed (Aukhil v. Mirza, 6 C. L. R., 93; see pp. 104 and 332, *supra*, as to possession *notwithstanding* the order).

A suit by a party bound by an order of the *mamlatdar*, for a *partition* of the whole property, a share in which was in dispute before the mamlatdar, is not a suit to *recover* the property within the meaning of this article. (See I. L. R., 5 Bomb., 25 and 27.) There is nothing in this article to restrict it to immoveable property only. (See I. L. R., 6 Calc., 709.) The order of the Sessions Judge refusing to move the High Court to interfere with the Magistrate's order cannot be treated as the *final order* in the case. (See Kangali v. Zomarudonissa, I. L. R., 6 Calc., 709.)

A *verbal* order alleged to have been passed by the Magistrate is not an order within the meaning of this clause (Mahomed v. Gunga, 2 Agra, 26). As to mamlatdars, see Bombay Act V of 1864. By an express provision of that Act, the decision of the mamlatdar is not conclusive as to the point of actual possession in any subsequent suit. But the decision of a Magistrate under the Code of Criminal Procedure is conclusive as to the possession (Lillu v. Annaji, I. L. R., 5 Bomb., 387).

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 48.—For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same. | Three years ... | When the person having the right to the possession of the property first learns in whose possession it is. |
| 49.—For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same. | Ditto ... | When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful. |

Nos. 48 & 49. (Nos. 48, 47, 35, 34, 33, 26 of Act IX; sec. 1, cl. 2, Act XIV.)

"Moveable property" inculdes *money* (see arts. 29 and 89; I. L. R., 8 Bomb., 17), but "*specific* moveable property" can hardly include *money*, A Division Bench of the Allahabad High Court has, however, held that a suit to recover a sum of *money* entrusted to the defendant for a specified purpose and misappropriated by him, is a suit to which art. 48 applies (Rameshar v. Mota Bhikh. I. L. R, 5 All., 341). See notes to art. 51 as to the distinction between *money* and other chattels. Where moveable property belonging to Z has been wrongfully converted by A, and such property has been sold by A's brother on A's account, and the sale-proceeds are subsequently held by A's brother on account of A's widow, there is no *dishonest misappropriation or conversion* on the part of A's *brother*, although he is responsible to Z for the money in his hands (Gurudas v. Ramnarain. I. L. R., 10 Calc., 860. P. C.)

Standing crops are not moveable property (I. L. R., 4 Calc., 665), but when such crops are cut, they may be treated as moveable property. As to when the possession of moveable property agreed to be sold and partly paid for becomes unlawful on the part of the vendor, see sec. 78, Act IX of 1872. Where the agreement is made for the sale of *immoveable*

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

*and moveable* property, sec. 85, Act IX of 1872, applies. The possession of the vendor or of his subsequent transferree in such a case becomes unlawful from the date of a decree for specific performance of the agreement (Dhondiba *v.* Ramchandra, I. L. R., 5 Bomb., 554). In a suit for wrongfully detaining title-deeds, time runs from the date when the title to the property comprised in the deeds is adjudged to the plaintiff, or the detainer's possession otherwise becomes unlawful. (See No. 33, Act IX of 1871.) Actions of trover come under art. 48, and actions of detinue under art. 49. (See I. L R., 7 Bomb., 429.) Art. 49 is the most *general* article applicable to suits for moveable property. Arts. 123, 126 and 127, which allow a period of twelve years, apply to certain suits in respect of moveable or immoveable property. Art. 133 prescribes a period of twelve years for suits for the recovery of moveable property *sold* by a trustee, depositary or pawnee. Art. 145 allows a period of thirty years for the recovery of moveable property from the depositary or pawnee himself.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 50.—For the hire of animals, vehicles, boats or household furniture. | Three years ... | When the hire becomes payable. |

No. 50. (No. 49, Act IX; sec. 1, cl. 8, Act XIV.) Art. 50 refers to the hire of certain things for use (*locatio rei*). Art. 56 refers to the hire of labour and services. Art. 50 and many of the following articles in Part VI treat of actions *ex-contractu*. Where a contract is *registered*, a suit for compensation for its breach is governed by art. 116, and not by any other article.

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|---|---|---|
| 51.—For the balance of money advanced in payment of goods to be delivered. | Three years ... | When the goods ought to be delivered. |

No. 51. (No. 50, Act IX) Balance—That which expresses the difference between the debtor and creditor sides of an account.—Wharton.

Money—It seems to be thought that "money" only means coin in gold, silver or copper. But in law "money" means and includes not only coin, but also generally any paper, obligation or security that is immediately and certainly convertible into cash, so that nothing can interfere with or prevent such conversion. (*Per* Stuart, C.J., in I. L. R., 3 All., 788, 793.) "Money" includes any currency usually and lawfully employed in buying and selling as the equivalent of money, as bank-notes and the like.—Webster. "Money" is the name given to the commodity adopted to serve as the *marchandise bennale*, or universal equivalent of all other commodities, and for which individuals readily exchange their surplus products or services.—Brande. Even provincial notes, if received as money, are money, but stocks are not money. (Rosco's Digest, 543.) For the protection of commerce, "money" cannot be pursued into the hands of a *bonâ fide* holder to whom it has passed in circulation, but this rule does not apply to other chattels. (See Lewin on Trusts, 7th Ed., p. 763.)

If there is no express stipulation as to the time of delivery, and the time cannot be ascertained by reference to any usage of the trade, or to the course of dealing between the parties, a *reasonable* time from the date of the advance of the money should be allowed (Boiddonath *v.* Lalunnissa, 7 W. R., 164).

## SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

### *Part VI.—Three years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 52.—For the price of goods sold and delivered, where no fixed period of credit is agreed upon. | Three years ... | The date of the delivery of the goods. |

No. 52. (No. 51, Act IX.) Arts. 52 and 53 are based on the ruling in Satcowry *v.* Kristo Bangal, 11 W. R., 529. Under art. 52 the date of the delivery of each article is the date of the cause of action for its price. Where all the items of an account are on one side, as, for instance, in a tradesman's bill, the fact that some items are within the period of limitation does not take the earlier items out of the operation of the statute. (Banning, 200; 11 W. R., 529; and notes to art. 85.) As to what constitutes *delivery*, see secs. 90—92 of the Contract Act.

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| 53.—For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit. | Three years ... | When the period of credit expires. |

No. 53. (No. 52, Act IX.) See notes to art. 52.

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| 54.—For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given. | Three years ... | When the period of the proposed bill elapses. |

No. 54. (No. 53, Act IX.)
When the contract was for six months' credit, the payment then to be made by a bill at two months, it was held that an action for the price would not lie at the expiration of six months, and that the time began to run from the expiration of (6 + 2 = ) 8 months. It was observed that the only action that would lie *before* the expiration of the period of the proposed bill was an action, not for the *price*, but for breach of contract in not giving the bill (Help *v.* Winterbottom, 2 B. and Ad., 431; Darby and Bosanquet, p. 19).

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| 55.—For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon. | Three years ... | The date of the sale. |

No. 55. (No. 54, Act IX.)
Suits for the price of goods, trees and growing crops are provided for in arts. 52 to 55. There is no such article for the price of *land* or of *immoveable* property *other* than trees or growing crops.

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| 56.—For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment. | Three years ... | When the work is done. |

No. 56. (No. 55, Act IX.)

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

A suit for the price of work done by an *attorney* or *vakeel* is *specially* provided for. (See art. 84. and W. R., Gap No., 18.) Where a duty requires a *continuation* of services, the *completion* of the duty is the cause of action. (Angell, 148.) The work must have been done at the *request* of the defendant.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 57.—For money payable for money lent. | Three years ... | When the loan is made. |

No. 57. (No. 56, Act IX; sec. 1, cl. 9, Act XIV.) A suit for *money lent* in the ordinary sense of that expression, is for a loan repayable *at once*, or what is the same thing in point of law, repayable *on demand*. Where there is a written or verbal agreement *fixing* a certain date for the repayment of the money, limitation runs from the specified date of paymont. Where such agreement is *verbal*, art. 115 applies (Rameshwar *v.* Ramchand, I. L. R., 10 Calc., 1033). Where it is written, art. 66 or some other article will apply.

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| 58.—Like suit when the lender has given a cheque for the money. | Three years ... | When the cheque is paid. |

No. 58. (No. 57, Act IX.)

A cheque is a bill of exchange generally drawn on a banker and payable on demand.

If a loan is made by means of a cheque given by the lender, a cause of action does not arise against the debtor till the cheque is cashed, even if the debtor makes use of the cheque and receives credit for it from his own banker before the cheque is actually paid (Garden *v.* Bruce, L. R., 3 C. P., 300; Banning, 25).

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| 59.—For money lent under an agreement that it shall be payable on demand. | Three years .. | When the loan is made. |

No. 59. (No 58, Act IX.)

See pp. 72, 220, & 221, *supra*, and compare Nos. 72 and 73. "Where a man promises to pay a sum of money, &c., on demand, which it is his duty to pay whether a demand be made or not, then the money becomes payable at once, and no demand is necessary before suing him for it; as, for instance, in the case of money lent, and money due for goods sold or for work done. But where a promise is made in consideration of some *collateral* thing being done on demand, there the demand must be made before the promise can be enforced, as in the case of a promise to pay Rs. 100 to B. if A should go to Dacca on demand, or if A should pay Rs. 200 to C upon demand." *Per* Garth, C. J., in Ramchunder *v.* Juggut Monmohinee, I. L. R., 4 Calc., 283, 294.

Where a person is bound by an agreement to buy his coparcener's share, on his refusing to sell his own share on demand to such coparcener, the demand is a *condition precedent* to enforcing the agreement (Verasami *v.* Ramsami, I. L. R., 3 Mad., 87). A promise that the money shall be "payable within six years on demand" is not governed by arts. 59 or art. 73 (Sanjini *v.* Kama, I. L. R., 6 Mad., 290).

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

Where the money is "payable three months *after demand*," a demand is necessary (Brown *v.* Rutherford, 14 Ch. D, 687; see also art. 72).

Sums paid to the credit of a customer with his banker, though usually called *deposits*, are in truth *loans* to the banker, as money paid to a banker becomes at once part of his general assets, and he is merely a debtor for the amount (Foley *v.* Hill, 2 H. L. Cas., 28; Banning, 14: see also Hinguh *v.* Debee, 24 W. R., 42). Money lodged with another person, whether a banker or not, under an agreement that it shall be repayable with interest on demand, although called a deposit, is in point of law a loan. Unless the recipient of the money is invested with the character of a *trustee*, the transaction is a loan, and not a deposit (Ram Sokh *v.* Brohmomoyee, 6 C. L. R., 470). The case of money deposited in a sealed bag, or which may otherwise be car-marked and recovered *in specie*, is different. (Banning, 15.) Such a case falls under art. 145.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 60.—For money deposited under an agreement that it shall be payable on demand. | Three years ... | When the demand is made. |

No. 60. A *loan* repayable *on demand* is payable *at once*, but a *deposit* of money repayable *on demand*, or a bill or note payable at a fixed time *after demand*, is not so payable. Art. 60 refers to cases where money is lodged with another under an express *trust*, or under circumstances from which a *trust* can be implied. (See the notes to the preceding article, 6 C. L. R., 470; and 12 C. L. R., p. 168.)

As to the *onus* of proof of *the demand*, see p. 113, *supra*. If the *first* demand has been a complete and unqualified demand, the period of limitation begins to run from the time of such first demand. (See Madhavbhi *v.* Fattesing, 10 Bomb., 487.)

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| 61.—For money payable to the plaintiff for money paid for the defendant. | Three years ... | When the money is paid. |

No. 61. (No 59, Act IX) Compare arts. 81, 82, 99, 100 and 107.

An action for money paid at the request, express or implied, and to the use, of the defendant, is governed by this article. The language of this article is applicable to suits for money paid to the use of the defendant even when the money has been paid *without* any request on his part. Whether, or under what circumstances, such suits are *maintainable* is a different question.

Before we apply art. 61 to a particular case, we must see if art. 81, 82, 99, 100, or 107 does not apply to it.

Where one of two brothers, borrowing money in his own name, applies it in payment of a joint debt, and borrows again to pay off the first loan, and then repays the second loan from his private funds, a suit for contribution against the other brother must be brought within the period prescribed, from the date of the application of the money in payment of the joint debt, and not from the date of the payment of the first or second loan. (See Ramkisto Roy *v.* Muddun Gopal Roy, 12 W. R., 194; see also Sunkur *v.* Goury, I. L. R., 5 Calc., 321.) Where the suit is brought by the manager of a joint estate of an undivided family in respect of a payment made by him on account of the estate, the same

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

rule applies under art. 107. Other suits for contribution are provided for by arts. 99 and 100. Arts. 81 and 82 apply to *special* cases of "money payable to the plaintiff for money paid for the defendant."

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 62.—For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. | Three years ... | When the money is received. |

No. 62. (No. 60, Act IX.)

Compare arts. 87 and 97. With special reference to the form of action "for money had and received by the defendant to the plaintiff's use" in the Courts of Law in England, Sir Barnes Peacock, C. J., delivering the judgment of the Full Bench, said:—"Nothing was more likely to mislead or to confuse than converting a suit brought in the Mofussil Courts to the forms adopted according to the English procedure." (Gogaram *v.* Kartick, 9 W. R., 514, 516, F. B.) But Act IX of 1871, No. 60, as well as the present article in the Act of 1877, appears to point to the well-known English action in that form, and it has been held by Markby and Prinsep, JJ., that this article should be read in connection with the English law so as to include cases of *constructive* receipts for the plaintiff's use (Raghumoni *v.* Nilmoni, I. L. R., 2 Calc., 393). But Mitter and Tottenham, JJ. (in Nundo Lall *v.* Meer Aboo, I. L. R., 5 Calc., 597), appear to have construed the language of this article more literally; Stuart, C.J., and Spankie, J. (in Ramkishen *v.* Bhawoni, I. L. R., 1 All., 333), seem to prefer the stricter interpretation; and their Lordships of the Privy Council (in Gurudas *v.* Ramnarain, I. L. R., 10 Calc., 860 864) appear to hold, that if the money when received is not received for the plaintiff's use, a mere equitable claim to follow the money in the hands of the defendant is not governed by this article. Where the head of an office draws from the treasury a sum of money to pay the establishment, but fails to pay a clerk under him, a suit for the pay of such clerk against the head of the office is a suit for money *actually* had and received by the defendant for the use of the clerk (Abhya *v.* Haro, 4 B. L. R., App., 68).

In England, in the ordinary action for money had and received by the defendant for the use of the plaintiff, money is commonly recoverable against a perfect stranger, and is continually resorted to to obtain the plaintiff's money wrongfully withheld. For instance, the action is maintainable to recover from a party who has wrongfully received the known and accustomed fees of an office belonging to another; and where the defendant has wrongfully obtained the plaintiff's money from a third party, as by a false pretence, it may be recovered in this form of action. It has been held that this form of action lies to recover money paid under a void authority. (*Per* Levinge, J., in Hurrish Chunder *v.* Azimooddeen, Sutherland's Special Number, pp. 181, 183.) And Lord Mansfield (in Moses *v.* Macfarlane, 2 Bar., 1005) held, that this equitable action lies for money paid by mistake, or upon a consideration, which happens to fail, or for money got through imposition or extortion or oppression, or an undue advantage taken of the party's situation contrary to laws made for the protection of persons under those circumstances. This form of action lies if it is *contra æquum et bonum* that the defendant

should retain the money against the plaintiff. (See Smith's Leading Cases, Vol. II, 8th Edn., p. 429.)

Art. 62 has been read in connection with the English law and considered to be applicable in the following cases.

1. Where the plaintiff sued for money overpaid by him to the defendant upon the supposition that it was due, that is, for recovery of money paid by mistake (Radhanath *v.* Bamachurn, 25 W. R., 415). But may not art. 96 apply to such a case? (See I. L. R., 6 Mad., 344.)

2. Where A deposited money in the Collectorate in the name of the plaintiff, and the defendants, without the knowledge or consent of the plaintiff, fraudulently took out the money from the Collectorate (Raghumoni *v.* Nilmoni, I. L. R., 2 Calc., 393).

3. Where the plaintiff's decree had been sold in execution, and purchased by the defendant, who realized certain monies under that decree, and the sale in execution being set aside, plaintiff sued for the money realized by the defendant (Bhowanikuar *v.* Rikhiram, I. L. R., 2 All., 354; see also 2 C. L. R., 165).

4. Where money realized in execution against a judgment-debtor was, under an erroneous order of the Court, made over to one of two decree-holders, and the other sued for the money by establishment of his prior right to the same (Ramkishen *v.* Bhowani, I. L. R., 1 All., 333, F. B.)

5. Where the money in question was deposited by the plaintiff with the defendant, pending negotiations for a new lease, and the arrangement was, that, if the new lease was granted, the money deposited should be treated as part of the security to be given for the due performance of the lease, but that, if no new lease were granted, the money should be returned, and the negotiations falling through, the plaintiff sued for the recovery of the money. [The money in this case did not become "money received by the defendant for the plaintiff's use" until the failure of the negotiations (Johuri *v.* Thakoor, I. L. R., 5 Calc., 830). It may be observed that art. 97 provides *specially* for suits for "money paid upon an existing consideration which afterwards fails."]

6. Where the plaintiff claimed, as one of the two heirs of B, a moiety of monies which at the time of B's death were deposited with a banker, and which the defendant, the other heir of B, had received from such banker (Kundun Lal *v.* Bansidhar, I. L. R., 3 All., 170).

7. Where the plaintiff sued for his share of an allowance attached to an hereditary office, against another sharer or alleged sharer, who had improperly received the plaintiff's share of the allowance (Harmukh *v.* Hurisukh, I. L. R., 7 Bomb., 191; Desai *v.* Desai, I. L. R., 8 Bomb., 426).

On the other hand, it has been held that the article does *not* apply to the following cases:—

1. Where the sale-proceeds of a certain property were retained by the vendor, and the plaintiff claimed a portion of the same as a zemindaree-due under a custom obtaining in the mahal (Kirath *v.* Ganesh, I. L. R., 2 All., 358).

2. Where compensation-money for lands taken up by Government had been lying in the Collectorate, and the defendant took out the money as the mokruridar of the lands, and the plaintiff, after setting aside the mokruri lease, which had been improperly granted by his deceased aunt, sued to recover the money so received by the defendant (Nundo Lall *v.* Meer Aboo, I. L. R., 5 Calc., 597).

3. Where the defendant, as an agent of A, sold goods entrusted to him by A (who died after the plaintiff had obtained a decree against him for their conversion); and where the defendant, as agent of the representative

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

of A, retained the proceeds, which the plaintiff had an equitable right to follow in the defendant's hands (Gurudas *v.* Ramnarain, I. L. R., 10 Calc., 860, P. C.; see also I. L. R., 7 All., 25).

The date of the actual receipt of the money is not necessarily the date on which "the money is received for the plaintiff's use. (See Johurilal's case cited above, 16 W. R., P. C., 20; and p. 105 (note), *supra.*)

But as to the construction of the words in the third column, "when the money is received," compare I. L. R., 10 Calc., 860, 864, P. C.; and Kalichurn *v.* Jogesh, 2 C. L. R., 354, 355. If when the money is received it is *not* received *for the plaintiff's use*, it would be safer to apply art. 120 (*ibid*).

"Money" in this article does not include stocks. (See notes to art. 51.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 63.—For money payable for interest upon money due from the defendant to the plaintiff. | Three years ... | When the interest becomes due. |

No 63. (No. 61, Act IX; sec. 1, cl. 9, Act XIV.)

Interest is money paid or allowed for the loan or use of some other sum of money. (See pp. 317 and 318, *supra.*)

The principal amount may be recovered, though recovery of the interest for more than three years is barred by limitation (see 7 Ch. Div., 120); but no interest can be recovered if the suit for the principal amount is barred by limitation (see p. 343, *supra*, and Hajee Syud Mahomed *v.* Mussamut Ashruffoonnissa, I. L. R., 5 Calc., 759, 765). The cause of action under this article is a recurring one, and so long as the principal sum is not barred by limitation, successive actions for amounts of interest successively becoming due may be brought. A suit for a *balance* of money payable for interest is governed by this article (Mokundi *v.* Balkishen, I. L. R., 3 All., 328).

With respect to arrears of interest on mortgages or other incumbrances, we have no provision corresponding to sec. 42 of the Statute 3 and 4, Will. IV, c. 27. It has accordingly been held that where both principal and interest are charged upon immoveable property, the period of limitation applicable to the recovery of the principal is applicable to the recovery of the interest. (See Gunput *v.* Adarji, I. L. R., 3 Bomb., 312, 332; Davani *v.* Ratna, I. L. R., 6 Mad., 417; Baldeo *v.* Gokul, I. L. R., 1 All., 603, 605.) See notes under arts. 132 & 147.

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|---|---|---|
| 64.—For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. | Three years ... | When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives. |

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

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*Part VI.—Three years.*

ART. 64.

No. 64. (No. 62, Act IX.) Cf. art. 85.

An "account stated," as opposed to an *open* account, is an adjustment which is *assented* to by *both* the parties. (See I. L. R., 6 Calc., 447, 451.) An account *closed* by the death of one of the parties, or otherwise, is not an account *stated*. (Angell, § 150.)

Under Act IX of 1871, the period of limitation in suits on accounts stated ran from the time "when the accounts were stated." *Any verbal* or unsigned statement of accounts (see 1 Shome, 37; 2 C. L. R., 346; I. L. R., 2 All., 872) might, therefore, have enabled the creditor to *evade* the law relating to *written* acknowledgments of debts (see Hirada *v.* Gadiji, 6 Mad., 197, 201), unless the term "accounts stated" was restricted to an adjustment of *cross*-demands between the parties. But as in *common talk*, an admission of any debt due from the defendant to the plaintiff is treated as "an account stated," the Indian Legislature, in 1877, amended the provisions of Act IX of 1871, and enacted that an account stated must be *in writing signed by the defendant or his agent*, in order that art. 64 might apply to it.

This article, as it stands, does not apply even to a *real* account stated unless it is in writing signed by the defendant or his agent. In a real account stated, a number of *cross*-demands are set off one against another, and a balance is struck in favor of one of the parties. In such a case, the law implies a *new* promise by the other party to pay the balance in consideration (not merely of past debts, but) of the *extinguishment* of the old debts on each side (see pp. 280-81, *supra*). Even when such a statement is *verbal*, or *not signed* by the defendant or his agent, the new promise is a new cause of action independently of sec. 19 or art. 64, and may be enforced within the period of three years under art. 115. It may be here observed that in a *real* account stated, it is not necessary that the statement should be made *within* the period of limitation prescribed for the recovery of the several cross-items (see 9 Bomb., 429). If what is, in common talk, called an account stated, is an account stated within the meaning of art. 64, it is even now possible to evade the provisions of sec. 19, unless this article is read along with that section, so as to make the article inapplicable except where, at the time of making the statement, all the several items of the account were unaffected by limitation. Art. 62 of Act IX of 1871 was read in this way by Jackson and Tottenham, JJ. (See Syud Mahomed Ali *v.* Mirza Dilwar Hossein, 2 Shome, 135.) But as art. 64 itself does not prescribe any time within which an account must be stated, and as the provision of sec. 19, that an acknowledgment to be valid must be made before the debt is barred, may, therefore, be evaded in many cases by suing in the form of a *so-called* account stated, it has been held by the Bombay High Court that this article does not, at all, apply to a *so-called* account stated where no *cross*-demands are set off against each other. (See Nahanibai *v.* Venkatidas, I. L. R., 7 Bomb., 414.) In Calcutta, however (see Dukhi Sahu *v.* Mahomed Bikhu, I. L. R., 10 Calc., 284, F. B.), all the Judges of the Full Bench *assumed* that art. 64 applied to accounts stated, even when there were no *cross*-demands, and the majority only held that the article did not apply if such statement of account was not "in writing signed by the defendant." The Allahabad High Court also took a similar view of the matter in Zulfikar *v.* Munnalal, I. L. R., 3 All., 148, F. B.

The law on this subject may be summarized as follows:—Art. 64 or sec. 19 does not apply to a *so-called* account stated when such statement *is oral*, or written but *not signed*. Such statement cannot, therefore, be of any use in saving from the operation of limitation a suit for the

balance, or for any of the items of the adjusted accounts. (See I. L. R., 2 All., 872, 874; I. L. R., 10 Calc., 284, 293.) A so-called account stated, if written and signed *under all the conditions* mentioned in sec. 19, renews the period of limitation as provided in that section. It has not yet been finally decided by all the High Courts, whether a *so-called* account stated, written and signed by the defendant, after some of the items of the account had been barred by limitation, would or would not save the *barred* items. Neither sec. 19, nor, according to the Bombay High Court, art. 64, applies to such a case.

A *real* account stated, *signed* by the defendant or his agent, is governed by art. 64, whether, at the date of the statement, some of the items adjusted were barred by limitation or not.

A *real* account stated, if *oral*, or *not* in writing *signed* by the defendant or his agent, is nevertheless a valid new contract for the payment of the balance, and though not governed by art. 64, is governed by art. 115. Supposing some of the items of the cross-demands are barred debts, the verbal or unsigned statement of accounts would, it is apprehended, nevertheless give a new starting point of limitation. But in the case of a *so-called* account stated, even if it be conceded that here also the law raises the implication of a new contract in consideration of a past debt, such contract will be void under sec. 25 of the Contract Act, if the debt itself is *barred* by limitation and the statement does not amount to a *promise in writing* signed by the defendant or his agent. (See I. L. R., 6 Bomb., 683.)

The words in the first column of art. 64 must be read with those in the 3rd column, and notwithstanding the ruling in the case of Sheikh Akbar *v.* Shekh Khan (I. L. R., 7 Calc., 256), accounts stated *verbally* are not governed by art. 64. (See I. L. R., 10 Calc., 284, 287.)

The simultaneous agreement, spoken of in the 3rd column as giving a start later than the date of the accounts stated, must also be in writing signed by the defendant or his agent. (See Dagdusa *v.* Shamad, I. L. R., 8 Bomb., 542.)

As to what are cross-demands, see the notes to art. 85.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 65.—For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency. | Three years ... | When the time specified arrives or the contingency happens. |

No. 65. (No. 63, Act IX.)

This is a *general* article for the recovery of either liquidated sums, or unascertained damages, for the breach of a promise *to do* anything at a *specified* time, or upon the happening of a *specified* contingency. Where the promise is not to do anything but to *abstain* from doing something, or where no fixed time or event is *specified* for the performance of the contract, art. 115 or some other article will apply.

If the promise is contained in a duly *registered* agreement, art. 116 will apply (Kishenlall *v.* Kinlock, I. L. R., 3 All., 712). A suit to recover money deposited under an unregistered agreement that it shall be payable on the happening of a specified *contingency* does not fall within art. 60 but is governed by art. 115 or 65 or 62. (See I. L. R., 5 Calc., 830.)

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

For the meaning of the word *compensation* in actions *ex-contractu*, as used in this schedule, see the notes to art. 116.

Where A, as surety of B, promises "if B does not pay eventually (*shesh parjanta*), I will," limitation does not run in favour of A until the creditor *demands* compensation from A on B's failure to pay (Bishumber *v.* Hungshesher, 4 C. L. R., 34). A case like this does not fall within art. 83, unless the date of A's *refusal* to pay is the date when the plaintiff is "actually damnified." A debtor's promise to pay, when he shall have the means to do so, may be enforced within three years from the date of his acquiring means to pay. If a person who has promised to do anything at a future specified time declares beforehand that he will not do it, this article does not prohibit a suit being brought against him before the time specified arrives. (See 1 Mad., 162.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 66.—On a single bond where a day is specified for payment. | Three years ... | The day so specified. |

No. 66. A single bond is a written engagement for the payment of money *without a penalty*. (I. L. R., 4 All., 3, 6.) There are no alternative conditions in a single bond. (Thompson.) Instalment-bonds are provided for in arts. 74 and 75. An ordinary *tamasuk*, it is apprehended, is a *single bond*, as well as a *promissory note* as defined in sec. 3. But as "promissory notes" and "bills of exchange" are spoken of together, as distinct from "bonds," in arts. 69, 72, 73, 80, &c., it may be doubted if a *tamasuk*, which is not negotiable, is a "promissory note" within the meaning of those articles. A bond which besides creating a money obligation gives the creditor, on default, the right of treating the transaction as a conditional sale of certain properties, is not a single bond (Lachman *v.* Kesri, I. L. R., 4 All., 3).

Where the debt is payable "*within* two years from the date of the bond," the time at which it *must* be repaid *is specified* within the meaning of this article. (See Ball *v.* Stowell, I. L. R., 2 All., 322, 331; Narain *v.* Gouri, I. L. R., 5 Calc., 21.)

A bond payable at a *specified date*, with a condition that on default of payment of *interest* at stated periods the creditor might immediately realize the whole amount due, is, according to some of the Judges, governed by this article (I. L. R., 5 Calc., 21; I. L. R., 2 All., 322). But see art. 80.

If the day specified is the 30th Pous of a particular year, and it turns out that Pous of that year contains only 29 days, limitation runs not from the 29th Pous, but from the day following (Almas *v.* Mahomed Raja, I. L. R., 6 Calc., 239).

A suit on a *registered* bond is governed by art. 116.

| | | |
|---|---|---|
| 67.—On a single bond where no such day is specified. | Three years | The date of executing the bond. |

No. 67. (No. 66, Act IX.) See the notes to art. 66.

The starting point of limitation in this case is fixed on the same principle as in art. 57.

It has been held that a bond *payable on demand* does not specify the date of payment and is governed by this article (Rupkishore *v.* Mohni, I. L. R., 3 All., 415). Art. 80 will, at all events, apply to such a case.

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ARTS. 68—72.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 68.—On a bond subject to a condition. | Three years ... | When the condition is broken. |

No. 68. (No. 67, Act IX.)

This article should be read with sec. 3, which lays down that *bond* "*includes* any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void, if a specified act is performed or is not performed, as the case may be." There is some difference of opinion as to the meaning of these words. (See I. L. R., 2 All., 654, F. B., and I. L. R., 8 Calc., 54.) A covenant with a penal clause is *not* a bond conditioned for the performance of a covenant. (I. L. R., 8 Calc., 54.) A bond containing a penalty is called an "obligation" in English law. (Wharton.) It should be remembered, that sec. 3 does not give an *exhaustive* definition of "bonds."

In the case of a post-obit bond, the condition of the bond is not broken until the death occurs, upon which the money becomes payable. In an action for the penalty against a subordinate officer on his bond to account at the end of his service, limitation does not run until the service ends.

| | | |
|---|---|---|
| 69.—On a bill of exchange or promissory note payable at a fixed time after date. | Three years ... | When the bill or note falls due. |

No. 69. (No. 68, Act IX.)

A promissory note is not *necessarily* negotiable. It may or may not be made payable to order or to the bearer; but it is *rarely* made payable only to a particular person named therein. (See sec. 3, and Wharton's Law Lexicon.)

For the rules regarding the date of maturity of negotiable instruments, see secs. 22—25, Act XXVI of 1881.

This article supposes that the bill has been accepted by the drawee, for if the bill has been dishonored by non-acceptance, art. 78 applies.

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| 70.—On a bill of exchange payable at sight, or after sight, but not at a fixed time. | Three years ... | When the bill is presented. |

No. 70. (No. 69, Act IX.)

A bill payable "at a fixed time after sight" is governed by art. 72. As to presentment for payment, see secs. 62—76, Act XXVI of 1881. The expressions "after date" and "after sight" are not synonymous.

| | | |
|---|---|---|
| 71.—On a bill of exchange accepted payable at a particular place. | Three years ... | When the bill is presented at that place. |

No. 71. (No. 70, Act IX.)

| | | |
|---|---|---|
| 72.—On a bill of exchange or promissory note payable at a fixed time after sight or after demand. | Three years ... | When the fixed time expires. |

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

ACT XV OF 1877.

*Part VI.—Three years.*

ARTS. 72—74.

No. 72. (No. 71, Act IX.)

The entries in the 3rd column of arts. 69, 70, 72, 73, 76, 77, 79, 81, 82, and 83 appear to be based on the English cases referred to by Messrs. Darby and Bosanquet at pp. 19 to 23 of their work on Limitation.

In a suit on a promissory note payable one year *after demand*, time does not commence to run until after the expiry of one year from the date when *demand* is made. (See Thorpe *v.* Booth; Banning, 27; pp. 113, 221, *supra.*) As to the construction of the words "payable after six months whenever the payee shall demand the money," under Act XIV of 1859, see Jeannissa *v.* Manikji, 7 Bomb., 36.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 73.—On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue. | Three years ... | The date of the bill or note. |

No. 73. (No. 72, Act IX.)

The starting point of limitation in this case is fixed on the same principle as in art. 59. See notes to art. 59. "Payable at any time within six years on demand" is not equivalent to "payable on demand." A promissory note so payable is *virtually* a note payable on demand, accompanied by a writing restraining the right to sue, inasmuch as the *terms* of the note restrain the suit unless demand is made *within* six years. It has been held in one case that this special form of note is not provided for by art. 73, and that it falls within art. 120 (Sanjini *v.* Kama, I. L. R., 6 Mad., 290). It was not suggested in this case that art. 80 (the general article for bills, notes and bonds) might apply.

Under this article the contemporaneous agreement restraining or postponing the right to sue must be in *writing.* (Compare 3 Bomb., O. C. J., 153.)

A new contract may be *substituted* for that contained in a promissory note payable on demand, and a suit on the basis of such a contract will not be barred simply because three years have elapsed from the date of the note. (See Natha *v.* Janardhan, I. L. R., 1 Bomb., 503.)

As to the former state of the law relating to bills and notes payable on demand, see pp. 220 & 221, *supra.*

| | | |
|---|---|---|
| 74.—On a promissory note or bond payable by instalments. | Three years ... | The expiration of the first term of payment, as to the part then payable; and for the other parts the expiration of the respective terms of payment. |

No. 74. (No. 74, Act IX.)

This article furnishes an instance of a contract where there are *successive* breaches. (See p. 218, *supra.*) Successive breaches of a contract to pay an annuity, and of *other* contracts written or verbal are provided for by art. 115.

ACT XV OF 1877.

ART. 75.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 75.—On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one instalment, the whole shall be due. | Three years ... | When the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver. |

No. 75. (No. 75, Act IX.)

A *verbal* agreement for the payment of money by instalments with a similar condition as to the whole amount becoming due (not being a promissory *note* or *bond*) is not governed by this article (Koylas *v.* Boykoonto, I. L. R., 3 Calc., 619). It may also be said that this article does not apply if the whole amount becomes due on default in payment of *two* or more successive instalments. See art. 80.

It has been held, that a condition that on default of payment of one instalment of *interest* the principal amount shall become due, does not fall within this article (Ball *v.* Stowell, I. L. R., 2 All., 322; Narain *v.* Gouri, I. L. R., 5 Calc., 21). But the same or nearly the same result will be arrived at by the application of art. 65, art. 115, or art. 80 to such cases. The only difference will be as to the effect of a *waiver* of the benefit of the condition.

If we do not take into consideration the express provision of art. 75 (Act IX and Act XV), waiver not amounting to a fresh agreement between the parties cannot affect the running of time when once it has commenced to run. (See Gumma *v.* Bhiku. I. L. R., 1 Bomb., 125; Ahmad *v.* Hafiza, I. L. R., 3 All., 514; Raghu *v.* Dipchand, I. L. R., 4 Bomb., 66, 68.) Before Act IX of 1871 came into operation, it was held that if the suit was not upon any such fresh agreement, but upon the original bond itself, proof of payment and acceptance of an instalment subsequently to the default could not help the plaintiff in any way. (7 W. R., 21, F. B.) Mere abstinence from suing for the whole amount due does not amount to *waiver* within the meaning of this article (Sethu *v.* Nayana, I. L. R., 7 Mad., 577; Gopala *v.* Paramma, I. L. R., 7 Mad., 583). A subsequent acceptance of the instalment in arrear may operate as a waiver, but merely allowing the default to pass unnoticed does not (Chenibash *v.* Kadum, I. L. R., 5 Calc., 97). Acceptance of payments made in reduction of the *whole* debt, and not on account of the particular instalment due, cannot, of course, amount to a *waiver* (Mumford *v.* Peal, I. L. R., 2 All., 857. See also the note to Gumma *v.* Bhiku, I. L. R., 1 Bomb., 125). But such payment may give a new start if sec. 20 be applicable.

In Mumford *v.* Peal, the Allahabad High Court say that to prove *waiver* even under art. 75, it is necessary to prove that the creditor has entered into some fresh parol arrangement, condoning the breach and creating new relations with the party in default. (I. L. R., 2 All., 857.)

Where the bond or note gives the creditor the *option* either of suing for the whole debt on the occurrence of the first default, or of waiting till the expiry of the term of the bond or note, it has been held that art. 75 does not apply (Koylas *v.* Boikunto, I. L. R., 3 Calc., 619; Narain

*v.* Gouri, I. L. R., 5 Calc., 21). But even in such a case it is necessary for the creditor to show that he has *exercised* his right of election in order that limitation may not be computed from the date of the first default. (See Ravalmal *v.* Dhondiba, 11 Bomb., 155, and I. L. R., 2 Bomb., p. 326.) Where the language of the bond showed that it was the intention of the parties that, in case of default made in payment of one instalment, the whole amount should become due, only *if* demand for such amount were made, it was held that time did not commence to run against the creditor until he made a demand for payment of the entire sum. (Hanmantram *v.* Bowles, I. L. R., 8 Bomb., 561.)

The provisions of art. 75 do not apply to *applications* for the execution of *decrees* under which money is payable by instalments. There is no provision for waiver in ch. 6, art. 179, and acceptance of payments made subsequently to default would not affect the question of limitation (Dulsook *v.* Chugon, I. L. R., 2 Bomb., 356; Shib *v.* Kolka, I. L. R., 2 All., 443; Ugranath *v.* Lagammani, I. L. R., 4 All., 83). There are several cases, however, in which it has been held that the right or privilege to execute the *whole* decree on the 1st default, *may be waived* so as to enable the decree-holder to sue out execution for subsequent *instalments* within three years of *their* falling due (Asmutullah *v.* Kally Churn, I. L. R., 7 Calc., 56, 60; Nilmadhub *v.* Ramsodoy, I. L. R., 9 Calc., 857; Karakavalasa *v.* Karanom, I. L. R., 3 Mad., 257; Kanchan *v.* Sheoprosad, I. L. R., 2 All., 291).

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 76.—On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen. | Three years ... | The date of the delivery to the payee. |

No. 76. (No. 76, Act IX.)

This article is apparently based on the decision in Savage *v.* Aldrin, where a note payable on demand was deposited with a banker for delivery to the payee on his producing another note cancelled, and it was held that the payee had no ground of action till the note was delivered, and that therefore limitation ran only from that time. (Darby and Bosanquet, 20.) Art. 76, however, does *not* say that the note must be one *payable on demand.*

| | | |
|---|---|---|
| 77.—On a dishonoured foreign bill where protest has been made and notice given. | Three years .. | When the notice is given. |

No. 77. (No. 77, Act IX.)

As to inland and foreign bills, see secs. 11 and 12, Act XXVI of 1881. As to dishonor, notice and protest, see secs. 91, 99,—*ibid.*

Time runs when notice of dishonor is given, not when the bill falls due. (Darby and Bosanquet, 23.)

| | | |
|---|---|---|
| 78.—By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance. | Three years ... | The date of the refusal to accept. |

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

No. 78. (No. 78, Act IX.)

According to English cases, time runs when *notice* of non-acceptance is given. Here it runs from the date of *refusal to accept*—not from the date of *non-payment* on the due date. Compare art. 79 of Act IX, the provisions of which have *not* been re-enacted.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 79.—By the acceptor of an accommodation-bill against the drawer. | Three years ... | When the acceptor pays the amount of the bill. |

No. 79. (No. 81, Act IX.)

The drawer is impliedly bound to *indemnify* the accommodation acceptor, and such acceptor is not actually damnified until he actually pays the bill. See No. 83.

| | | |
|---|---|---|
| 80.—Suit on a bill of exchange, promissory note or bond not herein expressly provided for. | Three years ... | When the bill, note, or bond becomes payable. |

No. 80. (No. 80, Act IX.)

This is a *general* article. See notes to arts. 66, 73, and 75. A suit by the endorsee of a bill or promissory note against the endorser will probably be governed by this article. See art. 73, Act IX, the provisions of which have *not* been re-enacted.

In suits against Government, on Government promissory notes, limitation runs from the date on which the note becomes payable after notice given in the Gazette in accordance with the terms of the loan. (See Financial Notification No. 59, dated the 11th January 1882.)

| | | |
|---|---|---|
| 81.—By a surety against the principal debtor. | Three years ... | When the surety pays the creditor. |

No. 81. (No. 82 of Act IX.) See arts. 61 and 83.

When a surety has paid a *co-surety* who has paid the creditor, a suit by such a surety against the principal debtor is not governed by this article, (See Rivaz, p. 123.) A suit by the creditor against the surety is governed by art. 65, or art. 83.

| | | |
|---|---|---|
| 82.—By a surety against a co-surety. | Three years ... | When the surety pays anything in excess of his own share. |

No. 82. (No. 83 of Act IX.) Compare art. 61.

This article deals with a particular class of suits for contribution. See also arts. 99 and 100 and the notes to art. 83.

The right to contribution is, generally, a *personal* right, and the remedy is a *personal* remedy. (See *In re* Leslie *v.* French, 23 Ch. D., 552, 563.)

| | | |
|---|---|---|
| 83.—Upon any other contract to indemnify. | Three years ... | When the plaintiff is actually damnified. |

*Part VI.—Three years.*

No. 83. (No. 84 of Act IX.)

If a man request another to become surety for him, and that other becomes surety and is obliged to pay, the principal debtor is bound by an *implied contract* to indemnify the surety, and to re-pay him any amount which, as such surety, he is obliged to pay. But a suit for *contribution* by a surety against a co-surety is *not* founded upon any *contract*. The obligation to contribute arises from what Austin calls a *quasi*-contract (Rambux *v.* Modhoosoodun, 7 W. R., 377, F. B.) For the views of the High Courts of Madras, Bombay and Allahabad, on this subject, see 5 Mad., 200; I. L. R., 4 Bomb., 214; I. L. R., 3 All., 66.

A contract to indemnify the plaintiff against any misbehaviour of a third person is governed by this article, if not by art. 65. Where the misbehaviour consists of an act of embezzlement, the date of the embezzlement is the date when the plaintiff is actually damnified (Shapurji *v.* The Superintendent, 12 Bomb., 238). Insurance is a contract of indemnity, but art. 86 *specially* provides for suits on policies of insurance.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 84.—By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid. | Three years ... | The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance. |

No. 84. (No. 85 of Act IX.) Compare art. 56.

A suit by a *mookhtear* for his costs is probably governed by art. 56.

Where there is an *express* agreement as to the time of payment, this article does not apply. Where the business or suit is *improperly* discontinued, an attorney (or vakil) has no cause of action. (See Nicholls *v.* Wilson, 11 M. and W., 106; Thompson's Act IX of 1871.)

The date of the decree or final order is the date of the termination of the suit. If the word "suit" in this article does not include appeals and applications, the word "business" must include work done in respect of applications and appeals. It has been held that until the costs are taxed and inserted in the decree, and the decree is issued, the suit or appeal does not *terminate* within the meaning of this article (Narayan *v.* A. Champion, I. L. R., 7 Mad., 1). But it has been also laid down that "the termination of a suit is when judgment is given in the Court in which the action is commenced" (Balkrishna *v.* Govind, I. L. R., 7 Bomb., 518). The suit does not necessarily *terminate* when the parties themselves settle their disputes out of Court (I. L. R., 1 Bomb., 505). An *application* against a suitor, in respect of costs due to his attorney, where such application is allowable, is not governed by this article (I. L. R., 1 Bomb., 253).

A suit for costs of drawing a conveyance, &c., falls within this article.

ACT XV OF 1877.

ART. 85.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 85.—For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties. | Three years ... | The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. |

No. 85. (No. 87, Act IX; sec. 8, Act XIV.)

Under Act XIV, this provision was confined to mutual accounts between merchants and traders, but the term "merchants and traders" was not construed very strictly. (Sec. 2 Ind. Jur., N. S., 241.) Under Act IX, limitation commenced to run from the *date of the last item* admitted or proved in the account. This article applies to mutual accounts between *any* two persons, and limitation runs (as under Act XIV) from the *close of the year* in which the last item admitted or proved is entered.

An account is a detailed statement of a series of receipts (credits) and disbursements (debits). An account is *open* where the balance is not struck, or though struck is not accepted or acknowledged to be correct by all the parties. An account is *current* when it has been going on as a *continuous* account between the parties. A running or continued account between two or more parties is an account current. Accounts are current until they are stopped, *i. e.*, so long as there is continuity in the dealings between the plaintiff and the defendant.

If there are such dealings between the plaintiff and the defendant in the course of business that sometimes the balance is in favor of one party and sometimes of the other, the dealings are *mutual* within the meaning of the law. (*Per* Sir B. Peacock, C.J., in Ghaseeram *v.* Monohor, 2 Ind. Jur., N. S., 241.) In Normul *v.* Pookermul, decided on the 19th August 1879 and reported in the *Englishman* of the 26th of that month, Justice Wilson held that there should be on each side matters which, if there were no running account, would form a cause of action. Money lent on one side, and money paid on account on the other, with the balance *always* in favour of the first, do not constitute reciprocal demands.

A continuous account between principal and agent with debits and credits on each side of it and containing several items which bring down the mutual dealings to a date which is within the prescribed period of limitation, falls within this article. (See Watson *v.* Aga Mehdee, L. R., 1 Ind. App., 346.) Items in such an account, even if dated more than three years before the institution of the suit, are not barred by limitation. (*Ibid.*) In Kushals *v.* Behari (I. L. R., 3 All., 523) the Allahabad High Court expressed an opinion that art. 85 would apply to ordinary banking accounts. In Naraindas *v.* Vissandas (I. L. R., 6 Bomb., 134) Sarjent, J., following the decision of Peacock, C. J., and Norman, J. (in 2 Ind. Jur., N. S.), held that an account of mutual dealings in *hundis*, where the defendant used to draw hundis on the plaintiff, and in order to keep him in funds used to remit hundis drawn in favour of the plaintiff on other firms, was a mutual account within the meaning of this article.

The following is a brief summary of the views of Pontifex, J., on the subject of mutual accounts and reciprocal demands:

If the balance was sometimes in favor of the defendant, but *generally*

in favour of the plaintiff (banker), the account between them is not a *mutual* one. If during nearly the whole of the time one of the parties could not say to the other "I have an account against you." the accounts between them could not be *mutual*. Even if such accounts could be called mutual, they could *only* be mutual down to the date when the defendant made his last payment to the plaintiff (banker). From the date when the balance was for the last time in favour of the defendant, it could not be said that there were *reciprocal demands* between the parties, and further that "the last item admitted or proved" in the article meant such item on the *defendant's* side of the account. (See H. Mahomed *v.* M. Ashrufoonnissa, I. L. R., 5 Calc., 759.)

In England, "where there have been mutual accounts, the statute is retarded by every fresh item, provided such item is within six years of previous items. And it seems to make *no difference* on *which side* the items are which are within the six years." (Banning, 201; see also Angell, § 147.) It has been held by Sarjent, J. (I. L. R., 6 Bomb., 134, 138), that where there is nothing to show a *change* in the nature of the dealings between the parties, the account (being a continuous one) would be a mutual account down to the date of the last advance made by the *plaintiff* (banker), although, latterly, the balance has been uniformly in his favour.

Mutual accounts are made up of matters of *set-off*. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts. (Angell, § 149.) Where the dealings on either side are so independent of each other that neither party in giving credit to the other relies on the debt which he has against him, there are no *mutual* dealings. (Shephard, 56.) In the Privy Council case cited above, there was an actual agreement between the principal and the agent that the former should be bound to pay the *balance* on an adjustment of accounts.

The year as computed in the account is not necessarily the English year or the Bengali or the Fusli year, but may be something different. If the accounts are made to the particular date on which the books are closed, the parties are allowed three years from the end of such *conventional* year. If the books are regularly made up year by year to the 30th June, limitation runs from the 30th June. The *close* of such year is the starting point of limitation, because that is the time when the balance will, in the ordinary course of business, be struck. (See Srinath Das *v.* Park Pittar, 5 B. L. R., 550.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 86.—On a policy of insurance when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers. | Three years ... | When proof of the death or loss is given or received to or by the insurers, whether by or from the plaintiff, or any other person. |

No. 86. (No. 88 of Act IX). This article does not apply when custom allows a certain *time of grace*. (See Norotomdas *v.* Dayabhai, 6 Bomb., 34.)

ACT XV OF 1877.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

| ARTS. 87—89. | Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|---|
| 87. | By the assured to recover premia paid under a policy voidable at the election of the insurers. | Three years ... | When the insurers elect to avoid the policy. |

No. 87. (No. 89 of Act IX.) The premia already paid become recoverable on failure of the consideration, *i.e.*, when the insurers elect to *avoid* the policy.

| | | | |
|---|---|---|---|
| 88. | Against a factor for an account. | Three years ... | When the account is during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates. |

No. 88. (No. 64 of Act IX.)

A factor is an *agent* employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation commonly called factorage or commission. A factor may buy and sell in his own name, and has a special property in, and a lien on, the goods. During the continuance of the agency, the right to sue accrues on demand and refusal. But if the agent dies, the action against his representatives must be brought within three years of his death, provided no demand had been made during his life. (See Lawless *v.* Calcutta Landing Co., I. L. R., 7 Calc., 627, 632.)

A suit for an *account* in its legal sense is not confined to a suit for a statement of what has been done with monies, &c. To *account* for monies is to *pay* any balance which might be found to be due upon taking the accounts (Kally Kissen *v.* Juggut Tara, 11 W. R., 76). For the ordinary form of prayer for an account, see Shoshi *v.* Guru, I. L. R., 7 Calc., 89, 91.

The termination of an agency like any other fact may be *inferred* or *presumed* from collateral facts. (6 C. L. R., 101, 106, P. C.)

| | | | |
|---|---|---|---|
| 89. | By a principal against his agent for moveable property received by the latter and not accounted for. | Three years ... | Same as in preceding article. |

No. 89. (No. 90, Act IX.)

The suit under this article is not necessarily for *specific* moveable property. It may be for *money* received by the agent during his agency. The agent may receive money from the principal for general purposes, or with directions to apply it to a particular purpose, or he may receive money from a third person for the principal, and in either case he is legally bound to account for such money when required to do so by the principal. A suit for an account (in its legal sense) against an agent is virtually a suit for property received and not accounted for. Moveable property in the possession of a relative as *manager* may be treated as property received by an agent. The agency, in such a case, may be

considered to terminate when the manager sets up a title in himself (Kally *v.* Dukhee, I. L. R., 5 Calc., 692, 698). Where the agent, on the demand of the principal, promises to render accounts on a future date, but does not, limitation will, it has been held, run from that date, as that is the date when he virtually *refuses* to render accounts (Hori *v.* The Administrator-General, 3 C. L. R., 446). It may be doubted, however, if an *absolute* refusal by the agent is not necessary to set time running against the principal.

Where money is advanced by the principal to his agent, the latter receives the money subject to an obligation to *account* for the money. No cause of action accrues to the principal at the date of the *advance*. (11 W. R., 76.)

A suit against an agent employed in the management of land or collection of rents, for money received or accounts kept in the course of such employment, or for papers in his possession, is (except in cases of fraud) governed by the one year's rule under sec. 30, Act VIII of 1869, B C., and sec. 24, Act X of 1859. (See I. L. R., 4 Calc., 550; 3 C. L. R., 258, 440, 444; 8 C. L. R., 285.) If such an agent delivers an account showing himself to be indebted, a fresh cause of action arises upon the admission by the settlement of account. An action for the balance on the account will be governed by the *general* law of limitation. Art. 64 or some other article will apply. (See 2 Hay, 509; 20 W. R., 309; 22 W. R., 338.) Suits against agents are *not specially* provided for in the Bengal Tenancy Act, 1885.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 90.—Other suits by principals against agents for neglect or misconduct. | Three years .. | When the neglect or misconduct becomes known to the plaintiff. |

No. 90. (No. 89, Act IX.)

This article governs a suit for damages against an agent in respect of the loss arising from his misconduct in neglecting to sue for debts due to his principal, or in so negligently selling his principal's property that the proceeds cannot be realized. (See Baboo Lall *v.* Vaughan, 2 Agra, 306.)

| | | |
|---|---|---|
| 91.—To cancel or set aside an instrument not otherwise provided for. | Three years ... | When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. |

No. 91. (No. 92, Act IX.)

Art. 44 provides for a suit by a ward, who has attained majority, to set aside a sale (whether by an *instrument* of conveyance or otherwise) by his guardian. Arts. 92 and 93 govern a suit to set aside an instrument which is impugned as a forgery. Art. 114 applies to a suit for the *rescission* of a contract. Art. 125 governs a suit to have an alienation of land by a Hindu or Muhammadan female having a qualified estate in it declared to be *void* except for her life or until her remarriage. Art. 126 provides for a suit by a Hindu governed by the *Mitakshara* to set aside his father's alienation of ancestral property.

ACT XV OF 1877.

ART. 91.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

There can be no doubt that this article applies where the *only* relief asked for is the setting aside of an instrument not otherwise provided for. But there has been some difference of opinion as to whether the article applies in cases where the plaintiff sues for *possession* of property "by setting aside a spurious or invalid instrument." (See Hazari Lal *v.* Jadaun, I. L. R., 5 All., 76.) It was held by Straight, J., in that case that "art. 91 is intended to apply to suits of the kind mentioned in sec. 39 of the Specific Relief Act, and to cases where a plaintiff seeks to have cancelled or set aside some instrument he has been induced by misrepresentation, concealment of facts, or other means of a like kind to enter into, or where the cancelment or setting aside of an instrument is the *only* relief asked." This opinion has been acted upon in several cases by the Allahabad Court. (See Uma *v.* Kalka, I. L. R., 6 All., 75, and the cases cited therein.) Where the object of the suit is *not* so much to have the instrument *itself delivered up and cancelled*, as to have it declared ineffectual in respect of the plaintiff's right in the property in suit, the article does not apply. (See Sobha *v.* Sahodra, I. L. R., 5 All., 322.) Where the main and substantial relief sought is the recovery of possession of immoveable property, the case is governed by the law of limitation applicable to such suits, and is not affected by the incidental question being raised whether the claim to possession can be defeated by the existence of an instrument in favor of the defendant. (See I. L. R., 5 All., 75, 77; 6 C. L. R., 12, 15, P. C.; 2 C. L. R., 10; I. L. R., 5 Calc., 363; I. L. R., 3 Mad., 215.) The declaration of the invalidity of the defendant's pretensions is no more than an *incidental* step in the assertion of the plaintiff's title and right to possession (Ikram Sing *v.* Intiram Ali, I. L. R., 6 All., 260). The prayer for the invalidation of the instrument may, in such a case, be treated as *surplusage* (I. L. R., 1 All., 409). Similarly, it has been said that a suit to *establish the right* of the plaintiff, after an adverse order under sec. 332 of the Code of Civil Procedure, can hardly be described with propriety as "a suit to set aside an order" within the meaning of art. 13 (Ayyasami *v.* Samiya, I. L. R., 8 Mad., 82).

If a person not having any title to an estate sells or mortgages it, the owner of the land is not bound to bring an action directly the deed is executed. He might very reasonably say—"Why should I be obliged to incur the costs and harassment of a suit when the property remains in my possession? It will be time enough for me to interfere when my possession is interfered with." He would not be *bound* to bring a suit to *set aside* the deed. Besides, the right to set aside the deed is a distinct right from the right to recover possession. (See Raja Ram *v.* Luchman, 8 W. R., 15, 22, F. B.) A deed made between plaintiff's ryot and an indigo-planter cannot, in the slightest degree, affect the rights of the plaintiff, and where the plaintiff was *no party* to it, it was held by Jackson and White, JJ., that he was *not entitled* to sue to set it aside. (See Babu Luchmee Prosad *v.* Sulhab Roy, 1 Shome, 43.) But whether entitled or not, he is, at all events, not *bound* to sue. (See Sikher *v.* Dulputty, I. L. R., 5 Calc., 363, 370, 378.)

In Bhawani *v.* Bisheshar (I. L. R., 3 All., 846), Straight and Duthoit, JJ., applied the provisions of art. 91 to a suit for possession of land by *cancelment* of a lease executed by a Hindu widow, who, it was alleged, had no proprietary title to the land. It was held, that art. 91 governed suits by *third* parties to have an instrument cancelled or set aside. In a later case (Ikram *v.* Intizam, I. L. R., 6 All., 260),

*Part VI.—Three years.*

it was said, that "the relief sought for by the plaintiffs," in the former case, "was impossible of attainment without getting rid of the lease given by the former proprietor." It is, however, rather difficult to reconcile the decision in Bhawani *v.* Bisheshar with the other rulings which have been already cited. If an instrument is *ab initio* void as against the plaintiff, by reason of its not having been executed by the plaintiff or by any person under whom he claims; or if the executant had no legal authority or competency to execute it, the plaintiff may treat it as a piece of waste paper. The existence of such an instrument can, in no way, obstruct the plaintiff's rights, and it is *unnecessary* for him to have that set aside, which has neither force nor effect. (See I. L. R., 5 All., 76, 77.) Where a conveyance is executed by a guardian without authority, or where the guardian exceeds his authority in executing it, it is not incumbent on the ward to sue to set it aside. He may sue to *recover the property*, and ask the Court merely, to prevent the purchaser from setting up the conveyance as an answer to the suit. (See I. L. R., 5 Calc., 363, 370, 385.)

But where the instrument impugned is voidable at the *option* of the plaintiff, he must sue to set it aside within the prescribed time.

In a suit under art. 91, the date of the execution of the instrument is not the date from which limitation runs. The plaintiff must be *entitled* to have the instrument cancelled or set aside, and the facts which so entitle him must be *known* to him. Time does not commence to run until the plaintiff, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit. A judgment-creditor has no *locus standi* in any Court to sue to set aside a benami or collusive deed of sale executed by the judgment-debtor, until he (the creditor) has reason to believe that the decree cannot be otherwise satisfied (Tawangar *v.* Kura Mal, I. L. R., 3 All., 394). The title to impeach an instrument does not accrue until it becomes operative in law. A gift by a Mahomedan, not accompanied by possession, is inoperative, and limitation under this article does not run until possession is taken by the donee (Meda Bibi *v.* Imaman Bibi, I. L. R., 6 All., 207, F. B.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 92.—To declare the forgery of an instrument issued or registered. | Three years ... | When the issue or registration becomes known to the plaintiff. |

No. 92. (No. 93, Act IX.) See notes to arts. 91 and 93.

Suits under this and the following article are, like suits under arts. 118 and 119, merely *declaratory* suits. A suit for *possession* of property, or even for declaration of *right to property*, is not governed by arts. 92 and 93, although the defendant relies upon an instrument, which the plaintiff impugns as a forgery.

Even if the plaintiff *incidentally* asks the Court to set aside the instrument, the three years' limitation will not apply (Trilochun *v.* Nobokishore, 2 C. L. R., 10; Nistarinee *v.* Anundmoyee, 2 C. L. R., 561).

Under Act IX, the date of the issue or registration was the starting point of limitation. Under the present Act, limitation does not run until the issue or registration becomes *known* to the plaintiff.

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SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

| ARTS. | Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|---|
| 93–95. | 93.—To declare the forgery of an instrument attempted to be enforced against the plaintiff. | Three years ... | The date of the attempt. |

No. 93. (No. 93, Act IX.) See notes to No. 92.

If the suit is merely for a declaration of the forgery of an instrument, which was to the plaintiff's knowledge registered, and which was also attempted to be enforced against the plaintiff more than three years ago, it will be barred by limitation *both* under this and the preceding article. (See Fakharuddin *v.* The Official Trustee, 10 C. L. R., 176, 180, P. C.; I. L. R., 8 Calc., 178.) Under this article, it is necessary that the defendant should have attempted to enforce the instrument *against the plaintiff.*

It is not necessary that the person who is to profit by the instrument should seek to obtain the *entire* fruits of it. It is quite enough if he seeks to place himself in an advantageous position, which, but for the instrument, he could not occupy. Limitation runs from the *first* attempt. (Fakharooddeen *v.* Pogose, I. L. R., 4 Calc., 209.)

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| | 94.—For property which the plaintiff has conveyed while insane. | Three years ... | When the plaintiff is restored to sanity, and has knowledge of the conveyance. |

No. 94. (No. 94, Act IX.) The suit under this article is not a suit merely to *set aside* a conveyance, but for the *property* conveyed. Compare art. 44.

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| | 95.—To set aside a decree obtained by fraud, or for other relief on the ground of fraud. | Three years ... | When the fraud becomes known to the party wronged. |

No. 95. (Nos. 95 and 96, Act IX; sec. 10, Act XIV.) See the notes to art. 12.

The *knowledge* of fraud predicated by the terms of art. 95 is not mere suspicion, but such definite knowledge as enables the person defrauded to seek his remedy in Court (Natha Sing *v.* Jodha Sing, I. L. R., 6 All., 406).

Where the right to sue, or the title upon which it is founded, or any document necessary to establish such right, has been *fraudulently concealed* by the defendant, sec. 18 applies. In the absence of *such fraudulent concealment*, the latter part of art. 95 provides a period of limitation *in extension* of the period which would, under some other article, apply to a suit, and not a period *less* than what, under ordinary circumstances, is allowed for bringing a suit of the same nature (Opender *v.* Gudadhur, 25 W. R., 476).

It certainly could not have been intended that, whereas in an ordinary case, the plaintiff would be allowed twelve years to bring a suit for possession, the period of limitation should be cut down to three years, because, in addition to wrongful possession on the part of the defendant, there had been a gross and carefully concocted fraud. (Chunder *v.*

*Part VI.—Three years.*

Tirthanund, I. L. R., 3 Calc., 504; see also I. L. R., 6 All., 75, 77.) The latter part of this article, it has been said, has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed or do some act, and desires to be relieved from the consequences of those acts. (*Ibid.*) But, in a suit to set aside a public sale brought about by fraud, a Division Bench of the Allahabad High Court said: "Fraud vitiates all things, and prevents the application of any other rule of limitation than that specially provided for relief from its consequences in art. 95." (Natha Sing *v.* Jodha Sing, I. L. R., 6 All., 406.) It has been held by a Division Bench of the Madras High Court that where the Collector orders compensation-money to be given to the defendant through fraud on his part, a suit for the payment of the money to the party entitled is governed by art. 95. (Venkata *v.* Krishna Sami, I. L. R., 6 Mad., 344.) A suit for breach of contract to indemnify against the fraud of a third party is not governed by this article. (Shapurji *v.* The Superintendent, 12 Bomb., 238.)

A suit to obtain possession by setting aside a decree obtained by fraud was, under Act XIV, held to be governed by the six years' rule of limitation. (Mussamut Jhisoman *v.* Babu Roop Narain, 6 W. R., 165.)

If a suit is *primâ facie* within the time allowed by this article, it is for the defendant to prove the contrary. If the defendant alleges that knowledge of the fraud was acquired by the plaintiff at a period earlier than that alleged by the plaintiff, the defendant must prove his own allegation. (I. L. R., 6 All., 407.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 96.—For relief on the ground of mistake. | Three years ... | When the mistake becomes known to the plaintiff. |

No. 96. (No. 97, Act IX.) According to a Division Bench of the Madras High Court (see I. L. R., 6 Mad., 344), the *mistake* spoken of in this article is not confined to the mistake of private *parties*, so that, money awarded to the defendant by the *Collector's* mistake may be sued for under this article.

Article 97 of Act IX referred to "mistake in *fact*." This article applies to *both* mistakes in *fact* and in *law*. There are cases in the Courts of Common Law in which it has been held that money paid under a mistake of law cannot be recovered. In equity, the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn, and there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake. (Daniel *v.* Sinclair, 6 App. Cas., 181, 190.)

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| 97.—For money paid upon an existing consideration which afterwards fails. | Three years ... | The date of the failure. |

No. 97. (No. 98, Act IX.) According to English law, this is a case of money had and received for the plaintiff's use. (See notes to arts. 62 and 87.)

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ARTS. 98, 99.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 98.—To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust. | Three years ... | The date of the trustee's death, or, if the loss has not then resulted, the date of the loss. |

No. 98. (No. 99, Act IX; sec. 2, Act XIV.) The *breach* of trust is committed by the trustee *before* his death, but the *suit* under this article is brought *after* his death. (See notes to sec. 10.)

The suit under this article is not for the recovery of the trust-property, but for compensation for loss. There is no express provision for suits during the *lifetime* of the trustee for such loss. Compare sec. 2, Act XIV of 1859, and see p. 522, *supra*. As to the liability for breach of trust, see sec. 23, Act II of 1882.

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| 99.—For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers. | Three years ... | The date of the plaintiff's advance in excess of his own share. |

No. 99. (No. 100, Act IX.) Under Act XIV of 1859, the six years rule applied to suits for contribution. (2 W. R., 266; 3 W. R., 134.)

Money realized by the sale of plaintiff's property in execution of a joint decree against the plaintiff and the defendant is, *perhaps*, not money *paid* within the meaning of this article. (See Fuckorudin *v.* Mohima, I. L. R., 4 Calc., 529.) But it is hardly possible that the Legislature intended that the plaintiff suing for contribution, in such a case, should have a longer period. The language of the article does not apply where one of the joint-debtors or co-sharers has paid *something in excess* of his share, but not the *whole* of the amount due. *Query.*—If art. 61 is not applicable to such a case.

The date when the money is *actually* paid to the decree-holder, not the date when it is offered, or ordered to be paid, is the date from which limitation runs. (Radha *v.* Rupchunder, 3 C. L. R., 480.) The payment must be *in excess* of the plaintiff's share before limitation runs under this article. (Suput *v.* Imrit, 6 C. L. R., 62.)

A suit for contribution by a *sharer* in a joint estate, where the amount of revenue paid in excess is *sought* to be made a *charge* on the share for which it was paid, is governed by art. 132, and not by this article. (Deo Nundun *v.* Deshputty, 8 C. L. R., 210, note.) A suit for the recovery of money paid by an *under-tenant* or a *mortgagee*, to protect the estate from sale for arrears of revenue, is also not governed by this article. (Ram Dutt *v.* Hurkh, I. L. R., 6 Calc., 549.) Art. 61 may apply to such a suit. But if it is sought to enforce a charge upon the land, art. 132 will apply. (See notes to art. 132.)

As to whether there is any *lien* or *charge* for the amount of monies in respect of which a right to contribution arises, see the notes to art. 132, and 23 Ch. D., 552, and 8 W. R., P. C., 17.

## SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

### *Part VI.—Three years.*

Suits for contribution against the estate of deceased co-trustees are governed by art. 100. Suits for contribution against co-sureties are governed by art. 82. Suits for contribution by the manager of a joint estate come under art. 107. Other suits for contribution (*e. g.*, by a sharer in a joint *undertenure*) may fall within the terms of art. 61.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 100.—By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution. | Three years | When the right to contribution accrues. |

No. 100. (No. 101, Act IX; sec. 2, Act XIV.) This article does not apply where the trustee who is liable to contribute is not dead. As contribution between co-trustees, see sec. 27, Act II of 1882.

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| 101.—For a seaman's wages | Three years | The end of the voyage during which the wages are earned. |

No. 101. (No. 102, Act IX.) Compare art. 7. Seamen, as opposed to watermen, are persons engaged in navigating ships, &c., upon the high seas. To obviate disputes between master and seamen, to secure obedience to orders, and to interest the seamen in the voyage, their earnings are made to depend on the *termination* of the voyage. (Wharton.)

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| 102.—For wages not otherwise expressly provided for by this schedule. | Three years ... | When the wages accrue due. |

No. 102. Arts. 4, 7, and 101 expressly provide for suits for wages in three special classes of cases.

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| 103.—By a Muhammadan for exigible dower (*mu'ajjal*). | Three years | When the dower is demanded and refused, or (where during the continuance of the marriage no such demand has been made) when the marriage is dissolved by death or divorce. |

No. 103. (No. 103, Act IX.) There is nothing in this article which prevents a Muhammadan wife from suing for exigible dower *without* a previous demand. (See Ameeroonnissa *v.* Mooradoonnissa, 6 Moo. I. A., 211.) Prompt or exigible dower is a debt always due and demandable, and payable on demand. But the principle of arts. 59 and 73 are not applicable to suits for exigible dower. The wife is not *bound* to sue immediately, or make any demand during the lifetime of her husband. Prompt or exigible dower *may* be, but need not necessarily be, exacted immediately, and limitation in respect of it does not run against the

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

wife so long as the marriage exists, except where the wife demands such dower and is refused. (See Mussamut Mulluka *v.* Mussamut Jumula, L. R., Sup. Vol., I. A., 135; 11 B. L. R., 375.) A clear and unambiguous demand and refusal sets time running against the wife, even during the continuance of the marriage. A previous *unsuccessful* application by the wife to sue her husband *in formâ pauperis* for her dower (though such application was opposed by the husband, who denied his liability to pay the dower), does not amount to a *demand* within the meaning of this rule. (Ranee Khajooroonissa *v.* Ranee Ryusoonissa, 15 B. L. R., 306, P. C.; 24 W. R., 163.) See notes to art. 104.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 104.—By a Muhammadan for deferred dower (*mu'wajjal*). | Three years ... | When the marriage is dissolved by death or divorce. |

No. 104. (No. 104, Act IX.) Where it is not expressed whether the payment of the dower is to be prompt or deferred, the whole is due on demand. Where the dower is merely described as *muwajjal*, or deferred, and there is no express stipulation as to the time before which it shall not be demandable, the question whether it must be presumed to be payable on the dissolution of the marriage by the death of *either* the husband or the wife, or whether it becomes demandable only on the death of the *husband*, is one which cannot be said to be free from doubt. (Mirza Bedar *v.* Mirza Khurrun, 19 W. R., 315, P. C.) In the absence of any contract as to the time of payment, limitation, under this article, runs from the dissolution of the marriage by divorce, or by the death of *either* the husband or the wife.

If dower is payable under a duly registered *kabinnamah*, art. 116 will apply. (See Amani *v.* Mir Moher Ali, 2 B. L. R., 306.)

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| 105.—By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee. | Three years ... | When the mortgagor re-enters on the mortgaged property. |

No. 105. (No. 105, Act IX.) A mortgagee remaining in possession after the mortgage has been satisfied is not a trustee (sec. 3). Under Act XV of 1877, a suit to recover, as against such a person, whatever may be found due upon a balance of accounts from the commencement of the mortgage, is not barred, if it is instituted within three years of the date *when the mortgagor gets back the possession of the mortgaged property*. Compare Baboo Lall *v.* Jamal Ali, 9 W. R., 187, F. B.

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| 106.—For an account and share of the profits of a dissolved partnership. | Three years ... | The date of the dissolution. |

No. 106. (No. 106, Act IX.) The nature of a suit under this article, and of an application under sec. 265 of the Contract Act, was discussed by Straight, J., in Harrison *v.* The Delhi and London Bank. (I. L. R., 4 All., 437.) Where the plaintiff prays, that the accounts of a

partnership may be taken, that a liquidator may be appointed to wind up the affairs of the partnership, and that (after realization of the assets and satisfaction of the liabilities of the same) the partners may severally be decreed in a certain proportion each of what remains, the suit has a *wider* scope, and is not governed by this article, but by art. 120. (I. L. R., 4 All., 437.) In the *absence* of any contract to the contrary, partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner; and if, from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members. (Sec. 253, Act IX of 1872.) The *winding up* of a partnership is the taking by the Court into its own hands the settlement of the partnership concerns. A suit for *dissolution* of a partnership is cognizable by the ordinary Civil Courts. (I. L. R., 7 All., 227, F. B.) It is proposed to make suits, under sec. 265 of the Contract Act, cognizable by Munsiffs and Subordinate Judges. (See Bill No. III of 1885.)

This article does not apply until the partnership has been *dissolved*. Indeed, "so long as a partnership continues *existing*, and each partner is in the exercise of his rights and the enjoyment of his property, the statute Law of Limitation has no application at all between the partners." (Banning, 204.) A member of a subsisting partnership cannot sue his co-partners for profits which had accrued up to a particular time, but must sue for a general account. (Doyaram *v.* Sookhanum, 16 W R., 141; see also 21 W. R., 300.) A suit on an *adjusted* partnership account is a suit on "an account stated," and is not governed by this article. (See Nobin *v.* Suroop, 6 W. R., 328.)

A suit for an account, such as is mentioned in this article, was formerly governed by the six years' rule under sec. 1, cl. 16, Act XIV of 1859. (Kalee Kristo *v.* Haran, 19 W. R., 277.)

This article has no bearing upon the question how far the account should be carried back. The time from which the account is to begin will, in a general account of partnership dealings and transactions, be the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure. (Lindley on Partnership, Ed. of 1873, p. 1033.)

Where a partnership is dissolved by the death of one of the partners, and the representative of the deceased partner does not bring a suit against the surviving partner to take the partnership accounts within the period allowed by this article, he may still sue to recover a share in a sum subsequently realized by the surviving partner in respect of partnership transactions. But, in such a suit, the defendant may deduct the amount, if any, which may be found due to him on taking the partnership accounts, although a substantive suit for an account is barred by this article. (Merwanji *v.* Rustomji, I. L. R., 6 Bomb., 628.) A suit for a share of partnership assets subsequently received by the surviving partner will be governed by art. 120, if not by art. 62.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 107.—By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate. | Three years ... | The date of the payment. |

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

No. 107. (No. 107, Act IX.) See the notes to art. 61, and I. L. R., 5 Calc., 321.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
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| 108.—By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease. | Three years ... | When the trees are cut down. |

No. 108. (No. 108, Act IX.) The date of the expiry of the lease does not affect the question of limitation, nor does the lessor's ignorance of the breach of covenant. The cutting down the trees is the cause of action. (Indoobhooshun *v.* Kenny, 8 W. R., S. C. C. Ref., 9; p. 218, *supra.*)

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| 109.—For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant. | Three years ... | When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession. |

No. 109. (No. 109, Act IX.) A suit for the mesne profits of immoveable property is governed by this article. Under Act XIV of 1859, the period of limitation for suing for such profits was six years. (Ranee Surnomoyee *v.* Onnoda Gobind, W R., Sp. No., p. 163, F. B.)

A *separate* cause of action in respect of the wrongful receipt by a defendant of the rents and profits of land belonging to the plaintiff, accrues immediately upon the *receipt* by the defendant of *each* several sum. (W. R., Sp. No., p. 163. F. B.) In a case under Act XIV of 1859 it was held, that where the amount of mesne profits could not be ascertained until the end of the year, the cause of action did not arise until the end of that year. (Byjnath *v.* Badhoo, 10 W. R., 486.) Mesne profits received three years next before the filing of the plaint cannot be recovered under the first portion of this article. (Kishnanund *v.* Kunwar Partab, I. L. R., 10 Calc., 785, P. C.)

Taking and carrying away standing crops from land, under a decree which is subsequently reversed, is wrongfully receiving the profits of immoveable property. (Shurnomoyee *v.* Pattari, I. L. R., 4 Calc., 625.)

In the second class of suits provided for in this article (see I. L. R., 7 All., 170. F. B.), time does not run from the date of the decree of the Appellate Court, but from the date when possession is recovered under such decree. In this class of cases, mesne profits for *any* number of years may be claimed, provided the suit is brought within three years of the recovery of possession.

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| 110.—For arrears of rent | Three years ... | When the arrears become due. |

No. 110. (No. 110, Act IX: cl. 8, sec. 1, Act XIV.) Article 9 allows a period of one year only for the price of *lodging*.

*Part VI.—Three years.*



This article does not apply to suits for arrears of rent of agricultural land and of undertenures under Act VIII of 1869, B. C. Compare sec. 29 Act VIII of 1869, B. C., and see 2 W. R., Act X, p. 21, F. B. The Bengal Tenancy Act, 1885, expressly provides that suits and applications for which periods of limitation are thereby provided, shall *not* be affected by secs. 7, 8 and 9 of Act XV of 1877.

Under this article, time runs from the date when the arrear becomes due—not necessarily from the end of the year. Arrears of rent which fell due within three years next before the institution of the suit may be recovered. The liability to pay rent *recurs* after fixed intervals, so that a portion of the arrears may be barred by limitation while the other portion is within time. (See p. 329, *supra*.) But if the landlord's title to the land is *extinguished*, he cannot sue for even the last three years' rents. (*Ibid*; see also Chundrabali *v.* Lukhee, 5 W. R., P. C., 1.) The rent becomes due at the last moment of the time which is allowed to the tenant for payment. If it is not paid within the time, it becomes an arrear, and continues an arrear until it is paid. Rent in arrear becomes due on the last day of the week, month or year in which it is payable. (See Kashi Kant *v.* Rohini Kant, I. L. R., 6 Calc., 325.) If the claim for arrears of rent is satisfied, but such satisfaction is nullified by a decree between the parties, the rent "becomes due" again, and a suit for such rent may be brought within three years of such nullification. (See p. 187, *supra*.) The fact that the landlord did not know who his tenant was, or the fact that he could not realize the rent from the recorded possessor of the tenure, does not give him a longer period against the real tenant. (See Ram Runjun *v.* Ram Lall, 5 C. L. R., 62.) Where the suit is for compensation for the *use and occupation* of land, this article does not apply. (Debnath *v.* Gudadhur, 18 W. R., 132.) As to when an arrear of rent, the amount of which is not ascertained, becomes due within the meaning of Act X of 1859, see Doyamoyee *v.* Bholanath, 6 W. R., Act X, p. 77, F. B.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 111.—By a vendor of immoveable property to enforce his lien for unpaid purchase-money. | Three years ... | The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance. |

No. 111. (No. 111, Act IX.) This article, as regards the starting point of limitation, is based on Toft *v.* Stephenson. (See Darby and Bosanquet, 122, 189.) In neither of the two cases mentioned in the 3rd column, is the vendor entitled to receive the purchase-money *before* the title is accepted. The purchase-money is secured by the vendor's lien on the land sold. Even when the vendee has been in *possession* of the property as such, the vendor has an equitable lien on the property for the unpaid purchase-money. (Trimalarav *v.* Municipal Commissioners, I. L. R., 3 Bomb., 172.) A *creditor* of an unpaid vendor can *not* claim a *lien* upon the property sold, for any unpaid portion of the purchase-money. (Huriram *v.* Dinapal, 11 C. L. R., 339.)

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

ARTS. 112, 113.

Compare the provisions of art. 132. According to the *English* law of limitation, there is *no* difference between the lien of a vendor for his purchase-money, and money otherwise charged upon, or payable out of, any land. (See Darby and Bosanquet, 118.) It seems that if the vendor *waives* his lien, his suit for the recovery of the purchase-money against the vendee *personally* is governed by art. 120.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 112.—For a call by a company registered under any Statute or Act. | Three years ... | When the call is payable. |

No. 112. (No. 112, Act IX.) Time (under Act XV) does not run from the date when the call is *made*, but from the date when the call is *payable*. This article refers to suits by a registered company against a member of the company to recover the amount of calls made on the shares taken by him.

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| 113.—For specific performance of a contract. | Three years ... | The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. |

No. 113. (No. 113, Act IX.) Even a suit for the specific performance of a *registered* contract is not governed by the six years' rule. The doctrine of specific performance was not recognized by the Roman law. No system of jurisprudence except that administered by the Courts of Equity in England, and her past or present colonies and possessions, has ever attempted to enforce the *actual performance* of contracts *in their very terms*. (Fry on Specific Performance, 2nd Ed., p. 3.)

According to the English law, and sec. 22 of the Indian Specific Relief Act, the jurisdiction of the Court to decree specific performance is *discretionary*, and the Court is *not bound* to grant such relief merely because it is lawful to do so. There may be circumstances under which a *delay* of nearly three years or a lesser delay may be fatal to a suit for the specific performance of a contract. (See Mokund Lall *v.* Chotay Lall, I. L. R., 10 Calc., 1061 ; and p. 81, *supra*.)

For cases of specific performance where *no* date is *fixed* for the performance, see Ahmed *v.* Adjun, I. L. R., 2 Calc., 323 ; The New Beerbhoom Coal Co. *v.* Buloram, I. L. R., 5 Calc., 175 ; Virasami *v.* Ramasami, I. L. R., 3 Mad., 87. Where a person executes a *conveyance* of land not in his possession, and the deed of conveyance does not contain any specific agreement to put the vendee in possession, a suit by the vendee for possession against the (vendor after he has recovered possession) is not a suit for the specific performance of a contract, but is governed by art. 136 or art. 144. (Sheo Persad *v.* Udai, I. L. R., 2 All., 718.)

Where there has been only a *contract* for the sale of land, a suit to have a conveyance executed and completed, and for possession of the property, is essentially a suit for specific performance of contract, and

the article applicable to such a suit is art. 113. The right to possession springs out of the contract of sale, and the relief by giving possession in such a case is comprised in the relief by specific performance. Besides, if a suit cannot be maintained for specific performance of a contract, it cannot be maintained for possession of the property agreed to be sold under such a contract. (Muhiuddin *v.* Majlis, I. L. R., 6 All., 231.)

Where the plaintiff's suit for possession of land was not founded on contract only, but on a title to the land acknowledged and defined by a deed of compromise which was only part of the evidence of the plaintiff to prove his case, it was held by the Privy Council, that the suit was one for the recovery of immoveable property, and was not barred although nine years had elapsed from the date of the compromise, and the defendant had been in possession of the property notwithstanding his agreement to divide it with the plaintiff. (Rani Mewa Kuar *v.* Rani Hulas, 13 B. L. R., 313, P. C.) A suit for recovery of possession of land, based on a previous compromise between the parties, is not a suit for specific performance of contract, but a suit for immoveable property, and is governed by art. 144. If the deed of compromise contains an express or implied agreement to surrender possession of the land, the possession of the defendants can only be adverse to the plaintiff from and after the date of the compromise by reason of their having refused to carry out that promise. (Mr. C. G. D. Betts *v.* Mahomed, 25 W. R., 521.)

It has been held by a Division Bench of the Allahabad High Court, that a suit for money, based on an *award* of arbitrators which directs its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced, and that art. 113 is applicable to such a suit. (Sukho Bibi *v.* Ram Sukh, I. L. R., 5 All., 263.) The correctness of this ruling may be questioned,—1st, because sec. 30 of the Specific Relief Act, 1877, does *not*, as regards the question of limitation, place *awards* on the same footing as *contracts*; and 2ndly, because the Court, in such a suit, orders the money to be paid as *compensation* for not satisfying the award. Even in the case of a *contract*, it is *not* strictly accurate to say, that "pecuniary damages upon a contract for payment of money are, from the nature of the thing, a *specific performance*." (See Fry on Specific Performance, 2nd Ed., p. 6, and notes to art. 116.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 114.—For the rescission of a contract. | Three years ... | When the facts entitling the plaintiff to have the contract rescinded first become known to him. |

No. 114. (No. 114, Act IX.) This article refers to the rescission of contracts as between promisors and promisees, and *not* to suits by *third* parties to have an instrument cancelled or set aside. (Bhawani *v.* Bisheswar, I. L. R., 3 All., 846, 848, see notes to art. 91.) On the subject of rescission of contracts, see secs. 35 to 38 of Act I of 1877. These sections do not distinguish contracts from actual transfers. Suits for the *rectification* of instruments are not *specially* provided for by this schedule.

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SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VI.—Three years.*

| ARTS. | Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|---|
| 115, 116. | 115.—For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for. | Three years ... | When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases. |

No. 115. (No. 115, Act IX; cls. 9 and 10, sec. 1, Act XIV.)

This is a *general* article for suits for compensation on unregistered contracts, whether express or implied, or on contracts which, though registered, are not *duly* registered in *British India* under the law in force at the time and place of execution. (See sec. 3.)

An obligation which the law raises upon a state of circumstances independently of an express or implied contract between the parties to be affected by it, is not a contract, but only a *quasi*-contract. (See p. 223, *supra*; and secs. 68 to 72 of the Contract Act.)

A suit for loss and damage to goods, based on breach of *bontract* to deliver, is governed by this article. See notes to art. 36, and I. L. R., 3 Mad., 76 & 107.

An obligation to pay money or do any other act founded on an ancient *custom* (relating to remarriages of widows, &c.), if it may be treated as an *implied incident* of a *contract* (of marriage, &c.), is governed by this article. (See the judgment of Spankie, J., in Madda *v.* Sheo, I. L. R., 3 All., 385.)

A suit against a *del credere* agent for the price of goods sold by him, and not paid for by the purchasers, is governed by this article, if not by art. 65. (See Okoor Persaud *v.* Foolkoomaree, 16 W. R., P. C., 35.)

A agrees to take steps to reinstate B in a certain property, in case B should be ousted from it. The agreement is *broken*, if A neglects to take steps to reinstate B within a *reasonable time* (say six months) from the date of the ouster. (See Dorab Ally *v.* Abdool Azeez, I. L. R., 6 Calc., 356, 367.)

As to "continuing breaches," see pp. 219 & 540, *supra*. As to "successive breaches," see notes to art. 75, and p. 218, *supra*. For the meaning of the term "compensation," see notes to art. 116.

*Part VII.—Six years.*

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| | 116.—For compensation for the breach of a contract in writing registered. | Six years ... | When the period of limitation would begin to run against a suit brought on a similar contract not registered. |

No. 116. (No. 117, Act IX.) See notes to art. 115.

This article does not apply to suits for *specific performance* of registered contracts, but to suits for *compensation* for the breach of *such* contracts.

An instrument may be registered in respect of *some* of the parties to it. In such a case a suit against the *others* is not governed by this

article. A suit by the endorsee against the endorser of a registered promissory note is not governed by this article if the endorsement has not been registered. (See 4 Mad., 366.)

Where the contract is *duly registered*, a suit for *compensation* for its breach must be governed by this article, although suits of exactly the same character are provided for in some other article. The words "not otherwise provided for," which occur in art. 115, are not to be found in this article. The period is to commence when limitation would begin to run against a suit brought on a similar contract not registered. These terms are large enough to cover contracts for payment of *rent*, as well as other contracts when in writing registered. (Vythilinga *v.* Thetchana-murti, I. L. R., 3 Mad., 77.) A suit by a vendee for a proportionate refund of price, based on a stipulation in a *registered* conveyance that if the lands sold be deficient in quantity the vendor shall be responsible for the value of the deficiency, is governed by this article, and not by any other article. (Kishen *v.* Kinlock, I. L. R., 3 All., 712.) So a suit to recover *money* due on a *registered* bond or promissory note is governed by this article, and not by arts. 66, 67, or the following articles. (Nobocoomar *v.* Siru, I. L. R., 6 Calc., 94; Husain *v.* Hafiz, I. L. R., 3 All., 600, F. B.; Magaluri *v.* Narayan, I. L. R., 3 Mad., 359; Ganesh *v.* Madhab, I. L. R., 6 Bomb., 75; Khunni *v.* Nasirooddin, I. L. R., 4 All., 255; Kalut *v.* Lala, 11 C. L. R., 361.)

In *ordinary* legal parlance, a suit to recover *money* due upon a bond, or otherwise, is a suit for a debt or sum certain, whilst a suit for *compensation* for breach of contract is a suit for unliquidated damages. (I. L. R., 6 Calc., 95; I. L. R., 5 Calc., 830, 832.) But there can be no doubt that, in the case of a breach of a contract for the payment of money, the amount agreed to be paid is only the *measure* of *damages*. If the contract be not performed, the Court will order the obligor to pay the amount as *satisfaction* for the *nonperformance* of the promise, and not *in performance* of the contract. It is true that, in Johnson *v.* Bland, Lord Mansfield said: "Pecuniary damages upon a contract for payment of money are from the nature of the thing a specific performance." But this remark is not *strictly* accurate. (Fry on Specific Performance, 2nd Ed., p. 6.) In ordinary parlance, in the case of money, it is said that a plaintiff sues for "the money," or "the same money" that was taken from him, not, as in the case of other things, for compensation. But, *in fact*, he does not sue for *the same* money or desire to recover *the same* money. He seeks an *equal* sum which, on account of its equivalence, is *called* the same sum, and thence again the same money. The plaintiff cannot insist on a restoration of such and such rupees; he can insist only on being paid their exact *value* in *other* rupees. This is *essentially compensation*. (Jagjivan *v.* Gulam, I. L. R., 8 Bomb., 17.) If payment of a bond or promissory note is refused, or is not forthcoming, then there is a breach, and the suit against the defaulting obligor or promisor, is not to make him do something *in furtherance of* the contract, for the time for its performance is passed, but is, in reality, one for *damages* for the breach of it, the measure of which will be the amount of the debt with interest. (I. L. R., 3 All., 609, 610. See also I. L. R., 6 Calc., 94, 95; I. L. R., 4 All., 256.)

"Compensation" is the general term used in the Indian Contract Act (sec. 73) to denote the payment which a party is entitled to claim on account of loss or damage arising from breach of contract (I. L. R., 3 Mad., 77), and the suit is none the less a suit for *compensation*, because it is brought for the specific sum due on a bond. (I. L. R., 6 Bomb., 76.)

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SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VII.—Six years.*

| ARTS. | Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|---|
| 117—119. | 117.—Upon a foreign judgment as defined in the Code of Civil Procedure. | Six years | ... The date of the judgment. |

No. 117. (No. 116, Act IX.) Compare No. 122.

"Foreign judgment" means the judgment of a Court situate beyond the limits of British India, *and* not having authority in British India, nor established by the Governor-General in Council. (Sec. 3, Act XIV of 1882.) All Courts, even in England, except the Privy Council, are foreign Courts, and their judgments are foreign judgments.

According to the Madras High Court, a suit lies on all foreign judgments, including judgments of Courts of Native States. (Sama *v.* Annamalai, I. L. R., 7 Mad., 164.) But, according to the Bombay High Court, judgments of Courts of Native States cannot be sued upon in British India. (Himmatlal *v.* Shivajirav, I. L. R., 8 Bomb., 593.)

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| | 118.—To obtain a declaration that an alleged adoption is invalid, or never in fact took place. | Six years | ... When the alleged adoption becomes known to the plaintiff. |

No. 118. (No. 129, Act IX.)

Article 129 of Act IX was defective in many respects. Articles 118 and 119 have considerably improved the law on the subject.

A Hindu widow adopts a son under the alleged authority of her deceased husband. Twenty years after the death of the husband, and fourteen years after the date of the adoption, the husband's sister gives birth to a son. Under art. 118, a suit to set aside the adoption by the sister's son, so many years after the death of the adoptive father and the date of the adoption, will not be barred, provided it is brought within six years of the time when the alleged adoption becomes *known* to the plaintiff. It was otherwise under Act IX. (Siddhesshur *v.* Sham, 23 W. R., 285.)

The death of the adoptive *mother* will give the plaintiff a fresh right to sue for *possession* of the property left by her husband. (See Rajendro *v.* Jogendro, 15 W. R., P. C., 41; Srinath *v.* Mahes, 12 W. R., 14, F. B.)

It was held, even under Act IX, that though art. 129 might bar a suit brought *only* for the purpose of *setting aside* an adoption, it did not interfere with the right which, but for it, a plaintiff had of bringing a suit to *recover possession* of real property within twelve years from the time when the right accrued. (Raj Bahadoor *v.* Achambit, 6 C. L. R., 12, P. C.; Purno *v.* Hemokant, 6 C. L. R., 46.) A suit under *this* article is merely a *declaratory* suit, and a plaintiff who neglects to bring such a suit is not thereby prevented from suing for any further relief when he becomes entitled to such relief afterwards.

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| | 119.—To obtain a declaration that an adoption is valid. | Six years | ... When the rights of the adopted son as such are interfered with. |

No. 119. (No. 129, Act IX.)

For an instance of a *declaratory* suit of this description under the old law, see Kalovakom *v.* Padapa, I. L. R., 1 Bomb., 248.

SECOND SCHEDULE—FIRST DIVISION : SUITS—(*contd.*)

ACT XV OF 1877.

ART. 120.

*Part VII.—Six years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 120.—Suit for which no period of limitation is provided elsewhere in this schedule. | Six years ... | When the right to sue accrues. |

No. 120. (No. 118, Act IX ; cl. 16, sec. 1, Act XIV.)

*Many* of the suits which fell under cl. 16 of sec. 1, Act XIV of 1859, were *specially* provided for by Act IX. and a *few* others which were not mentioned in Act IX have been *specially* provided for by Act XV. (See pp. 68 and 72, *supra*.) Thus suits for the wrongful removal and appropriation of moveable property,—suits for contribution,—suits for the restitution of conjugal rights,—suits by a partner for an account after dissolution of the partnership,—suits for money had and received to the plaintiff's use,—suits to set aside decrees obtained by fraud,—suits to set aside official acts of Government Officers,—suits to set aside instruments, &c., &c., were governed by the six years' rule under cl. 16, sec. 1, Act XIV ; but shorter periods were provided for them by Act IX. So, again, suits to restrain waste, which were nowhere mentioned in Act IX, are now specially provided for by art. 41, Act XV.

Article 120 is of exceptional application, and before applying it, the Court must be satisfied that no other provision of the Limitation Act can be applicable. (Kundun Lal *v.* Banse Dhar, I. L. R., 3 All., 170, 172.)

Articles 36, 49, 61, 62, 115, 116, and 144 may cover many cases which, at first sight, appear not to have been specially provided for.

Suits for perpetual *injunctions* and suits for the *rectification* of instruments have not been specially provided for ; but the doctrine of *laches* is applicable to suits for such relief, and the Court will, in the exercise of the *discretion* which it has, decline (in the absence of special circumstances) to make a decree, even if a much lesser time than six years has elapsed. (See pp. 79, 83, *supra*.)

*Declaratory* suits in respect of forged instruments, adoptions, alienations by Hindu and Muhammudan females, and a Hindu's right to maintenance, are expressly provided for by arts. 92, 93, 118, 119, 125, and 129. But other suits, in which the declaration sought is of a right in property, have not been specially provided for. As regards specific moveable property, it may be observed that a suit for such property is generally governed by the three years' rule under arts. 48 and 49 ; and that as regards immoveable property or any interest therein, a suit for *possession* is generally governed by the twelve years' rule under art. 144. In a case tried under Act XIV of 1859, Couch, C. J., and Ainslie, J., were *inclined* to hold that the twelve years' clause applied to suits for *declaration of title* to land. (Musst. Doolhun *v.* Lall Beharee, 19 W. R., 32.) In another case, decided under the same Act, Melvill, J., held that the six years' clause applied to such a suit, while Nanabhai Haridas, J., was distinctly of opinion that such a case was governed by the twelve years' rule. (Moru Bin *v.* Gopal Bin, I. L. R., 2 Bomb., 120.) In a very recent case under Act XV of 1877, Mitter and MacLean, JJ., treated this question as still open. (Luchmon *v.* Kamchun, I. L. R., 10 Calc., 525, 527.)

As to suits for *declaration* of right to the *malikana* of alluvial accretions temporarily settled by Government with the defendant, see Gopinath *v.* Bhugwat, I. L. R., 10 Calc., 697.

When the plaintiff is in *full and complete possession* of immoveable property, and seeks the declaration only with a view to establish a right

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SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VII.—Six years.*

ART. 120.

to the possession of title-deeds or to clear away some cloud upon the title, the suit is hardly a suit for the *recovery* of immoveable property or of any interest therein. (See Azimunnissa *v.* C. Dale, 6 Mad., 455, 476.)

If a person, who is admittedly in possession of land as a tenant, wishes to establish his proprietary right to the same and to be *maintained in proprietary possession* thereof, he would, it has been held, be entitled to the period of limitation prescribed for a "suit for *possession*" of land. (Debiprasad *v.* Jafar Ali, I. L. R., 3 All., 40.) For the converse case of a suit to establish the right to receive rent from the party in possession, see I. L. R., 5 Calc., 949. It should be remembered that in a suit for a declaratory decree, the Court may refuse to make the declaration asked for, even if the suit is brought within the period of limitation. (See 19 W. R., 22; 23 W R., 42; and p. 81, *supra.*)

It has been held that a suit for an account against a person who was trustee and guardian during the plaintiff's minority is governed by art. 120. (Sarada *v.* Brojo, I. L. R., 5 Calc., 910. But see Hurro *v.* Tarini, I. L. R., 8 Calc., 766.)

It has been also held that the account itself should not be carried back further than six years immediately preceding the institution of a suit for an account against the trustee. (Hemangini *v.* Nobinchand, I. L. R., 8 Calc., 788, 807.) In a suit against a coparcener and manager of the joint estate for an account of the *whole* period of his management, the accounts taken by the Judge were limited to the six years immediately preceding the institution of the suit in 1874. On appeal, their Lordships of the Privy Council, passingly remarked, that the accounts were so limited "apparently, by force of the Statute of Limitations." (Orde *v.* Skinner, 7 C. L. R., 295, 300, P. C.) As to partnership accounts, see notes to art. 106.

A landlord got a decree for rent at an enhanced rate, which was affirmed by the High Court, but was ultimately reversed by the Privy Council. Between the date of the first decree and its ultimate reversal by the Privy Council, the same landlord, on the basis of the original decree, obtained a number of decrees in analogous cases against the same defendant, the amount of which he realized in execution. The tenant, on the strength of the Privy Council decision, sued for a refund of the excess above the usual rent paid under execution of the several decrees for rent, and it was held that a suit of this description could hardly have been in the contemplation of the Legislature at the time when the Limitation Act was passed, that there was some difficulty in treating the suit as one for money had and received, and that the safer course was to apply the six years' rule to such a case. (Kalichurn *v.* Jogesh, 2 C. L. R., 354.)

It has been held that a suit for compensation for *use and occupation* is governed by the six years' rule. (See 18 W. R., 132, cited under art. 110.) But it may be doubted if such a suit is not a suit for some reasonable compensation for the breach of an *implied* contract falling under art. 115. (See Ali *v.* Appadu, I. L. R., 7 Mad., 304, 305.)

Where the plaintiff claims a *pala* or a right to the worship of an idol for a few days or months of every year, his suit to establish such right is governed by art. 131; but where he claims an *exclusive* right of worship, his suit is governed by art. 120. (Eshan *v.* Monmohini, I. L. R., 4 Calc., 683; Gopeekishen *v.* Thakoordass, I. L. R., 8 Calc., 807.)

A suit by the creditors of a deceased person to follow his lands or the assets of his estate, in the hands of a mortgagee or a purchaser from the heir or devisee, when maintainable, is governed by this article. (Greender *v.* Mackintosh, I. L. R., 4 Calc., 897, 930.)

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*) ACT XV OF 1877.

*Part VII.—Six years.*

ART. 120.

A suit to compel a tenant of land to remove trees planted by him in contravention of custom or contract, is governed by art. 120. (Gunesh *v.* Gundom, I. L. R., 9 Calc., 147.)

A suit under Act XV of 1877, to establish right to property, by a person against whom an order under sec. 246, Act VIII of 1859, was passed, is governed by this article. (Bissessur *v.* Murali, I. L. R., 9 Calc., 163.) In this case it was not *necessary* to consider whether the twelve years' rule did not apply to an unsuccessful claimant's suit for *immoveable* property. Cf. I. L. R., 8 Mad., 134.

A suit for *haqqi-chaharam*, based on *custom*, must be brought within six years under this article. (Kirath *v.* Ganesh, I. L. R., 2 All., 235.)

A suit against a Municipal Committee, for a declaration of plaintiff's right to establish a market on his land, and for a perpetual injunction restraining the committee from interfering with his so doing, comes under this article. (Birjmohun *v.* The Municipal Committee of Allahabad, I. L. R., 4 All., 102.)

A suit to enforce a right of pre-emption in respect of a conditional sale that has become absolute is governed by this article. So also a suit to enforce a right of pre-mortgage. (Nath Prasad *v.* Ram Paltan, I. L. R., 4 All., 218, F. B.; Rasik *v.* Gojraj, I. L. R., 4 All., 414.) This rule is more specially applicable where the property sold is incapable of physical possession. (*Ibid*, see also Ashik *v.* Mathara, I. L. R., 5 All., 187.) A declaratory suit by one pre-emptor against another, for the determination of the question as to which of the two has the better right to pre-empt the property sold by its owner to a third person, is governed by art. 120. (Durga *v.* Haidar, I. L. R., 7 All., 167.)

Where debt lies on a *statute*, an action for the debt is governed by art. 120. (President of Municipal Commission *v.* Srikakulopu, I. L. R., 4 Mad., 124) In this case the suit was for recovery of a tax which had not been paid by the defendant.)

Suits arising out of certain relations *resembling* those created by contract, under secs. 68 to 72 of the Indian Contract Act, 1872, will, generally speaking, be governed by art. 120. But arts. 48, 61, 62, and 96 may apply to *some* of these suits.

In Sanjini *v.* Kama (I. L. R., 6 Mad., 290), a Division Bench of the Madras High Court held, that a suit upon a promissory note "payable at any time within six years upon demand" was governed by art. 120. But it does not appear that the provisions of art. 80 were brought to the notice of the Court.

A suit for maintenance by a person *other* than a Hindu not being governed by arts. 128 and 129, falls within this article if it cannot come under art. 115, 116, or 132.

As to the applicability of art. 120, see also I. L. R., 4 Calc., 529, cited under art. 99, which relates to *certain* suits for contribution; I. L. R., 5 Calc., 597; I. L. R., 1 All., 333, and I. L. R., 10 Calc., 860, P. C., cited under art. 62, and referring to certain cases of "money had and received" by the defendant; I. L. R., 6 Calc., 34, cited under art. 32, and relating to damage to real property in contravention of a covenant; and I. L. R., 4 All., 437, cited under art. 106. As to suits for the price of land against the buyer, see the notes to art. 111. A suit to remove the manager of a temple, to deprive him of his control over the temple properties, and for a declaration that the plaintiff is entitled to appoint another manager in the place of the defendant is governed by this article, if not by art. 124 or 144. (Balwant *v.* Puran, 13 C. L. R., 39, P. C.)

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SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VIII.—Twelve years.*

| ARTS. | Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|---|
| 121, 122. | 121.—To avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or in a *patni taluq* or other saleable tenure sold for arrears of rent. | Twelve years ... | When the sale becomes final and conclusive. |

No. 121. (Nos. 119 and 120, Act IX; sec. 7 and sec. 1, cl. 12, Act XIV.) The same principle applies to sales for arrears of rent as to sales for arrears of revenue; and undertenures or other incumbrances are only *voidable* at the *option* of the purchaser. It is, however, not necessary, for the purpose of avoiding an undertenure or other incumbrance, that the purchaser should give any notice or do any act before bringing his suit, provided the suit is brought within the time prescribed by this article. (Titu Bibee *v.* Mohesh Chunder, 12 C. L. R., 304; I. L. R., 9 Calc., 683, F. B.) Justice and sound policy require that the option of avoidance should be exercised "within a reasonable time," but this object is in some measure secured by the Limitation Act. (See Raja Suttosurrun *v.* Mohesh Chunder, 11 W. R., P. C., 10.) Section 167 of the Bengal Tenancy Act, 1885, makes some additional provisions in furtherance of the same object.

As to the privilege of auction-purchasers at such sales, and their exemption from the effect of laches on the part of the old proprietor, see Goluck *v.* Hurro, 8 W. R., 62; Moonshee Buzlool *v.* Prandhan, 8 W. R., 22; Kooldeep *v.* The Government, 11 B. L. R., 71, P. C.; Narain Chunder *v.* Taylor, 2 Shome, 78; Woomesh *v.* Rajnarain, 10 W. R., 15.

The assignee or transferree of the auction-purchaser is entitled to exercise the rights of the purchaser. (Koylas *v.* Jubur, 22 W. R., 29; Koylas Bashinee *v.* Goluckmoni, 10 C. L. R., 41.)

Encroachments on the talook or estate by neighbouring zemindars may be treated by the auction-purchaser as *incumbrances*. (8 W. R., 62; 10 W. R., 15.)

An *easement* created by the tenant is an *encumbrance* within the meaning of the Bengal Tenancy Act, 1885. (See sec. 161.)

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| | 122.—Upon a judgment obtained in British India, or a recognizance. | Twelve years ... | The date of the judgment or recognizance. |

No. 122. (No. 121, Act IX; cl. 11, sec. 1, Act XIV.) There has been some difference of opinion as to whether a *suit* would lie on an unsatisfied *judgment* of a Court governed by the Civil Procedure Code. (See Sander *v.* Shaik Jomir, 9 W. R., 399; Attormoney *v.* Hurry Doss, I. L. R., 7 Calc., 74; Moonshi Golam *v.* Curreembux, I. L. R., 5 Calc., 294; Bhavani Shanker *v.* Pursodri, I. L. R., 6 Bomb., 292.) Most of the cases on the subject are reviewed in Merwanji *v.* Nowroji, I. L. R., 8 Bomb., 1, where it has been held that no such suit would lie in our Courts.

The Limitation Act is not intended to define or create causes of action. (I. L. R., 3 Bomb., 207, 209.)

Section 94 of the Presidency Small Cause Court Act, 1882, expressly enacts that no suit shall lie on any decree of such Court.

Recognizance-bonds are usually taken from complainants, witnesses, accused persons, and their sureties, under the Criminal Procedure Code. The *criminal* Courts cannot levy the amount forfeited by the sale of *immoveable* property.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VIII.—Twelve years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 123.—For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate. | Twelve years ... | When the legacy or share becomes payable or deliverable. |

No. 123. (No. 122, Act IX; cl. 11, sec. 1, Act XIV.) This article applies to moveable as well as to immoveable property, to bequests under wills, as well as to shares in cases of intestacy. Article 140 governs a suit by a devisee for possession of *immoveable* property against *any person* who may be in possession of the same. The defendant, in a suit under art. 123, is the executor, administrator, or other *representative* of the estate of the deceased; and the plaintiff claims the property *as a legacy or a distributive share*. A suit by a *purchaser* from the legatee, against a person *unlawfully in possession* of the property, is not governed by this article. (Issur Chunder *v.* Juggut Chunder, I. L. R., 9 Calc., 79.) The word 'share' is not intended to exclude the *whole* residue. (Kherode *v.* Durgamony, 2 C. L. R., 112, 118.) A part of the residue not disposed of by will, as well as a share of the residue bequeathed by the testator, is governed by this article. (Hemangini *v.* Nobinchand, I. L. R., 8 Calc., 788, 805; Tripura Sundari *v.* Debendro Nath, I. L. R., 2 Calc., 45, 54.) The applicability of this article has been also considered in I. L. R., 5 Calc., 692.

The assent of the executor is necessary to complete a legatee's title to his legacy. An executor is not *bound* to pay or deliver any legacy until the expiration of one year from the testator's death. (See secs. 292, 297, Act X of 1865; and secs. 112 and 117, Act V of 1881.) Where, under the terms of the will, a legacy is payable on the happening of a contingency, time does not run until the contingency happens. (Prosunno *v.* Gyan, 13 W. R., 354.)

The question when a legacy or share becomes payable or deliverable, is referred to at p. 799, I. L. R., 8 Calc., but the High Court does not decide the question. For the English law on the subject, see Darby and Bosanquet, pp. 128—133. Time usually runs from the end of one year after the testator's death. But inasmuch as the executor's year is allowed only for convenience and does not prevent vesting, it may possibly be *otherwise* where there are clearly assets at once. (Banning, 209 and 210.)

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| 124.—For possession of an hereditary office. | Twelve years ... | When the defendant takes possession of the office adversely to the plaintiff.<br>*Explanation.*—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed. |

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SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VIII.—Twelve years.*

ART. 125.

No. 124. (No. 123, Act IX.) The possession of the office of *Dharmokarta* of a Pagoda by a female, married and estranged from the family of the founder, may be adverse to the surviving male members of the family, and may, after twelve years, extinguish their right to the office. (Chenna Kesavaraya *v.* Vaidelinga, I. L. R., 1 Mad., 343.)

An hereditary office, according to Hindu law, is immoveable property. Where such office could be held by Hindus *only*, it was, in the *absence* of a definition of immoveable property, in Act XIV of 1859, treated as such by the Courts. (See Venkata *v.* Surayya, I. L. R., 2 Mad., 283; and pp. 177, 202, *supra.*) A suit for the recovery of an hereditary office, which could be held by Hindus *as well as* by other persons, was governed by the six years' rule under Act XIV. (I. L. R., 2 Mad., 283; but cf. I. L. R., 5 Bomb., 70.) Since Act IX of 1871 came into operation, the twelve years' rule applies to suits for possession of *all* hereditary offices.

The right to the lands or other emoluments attached to an hereditary office, being a secondary claim in a suit for the possession of the office, is affected by the same bar which affects the claim for the office. (Zammiraru *v.* Pantina, 6 Mad., 301.)

It is a general principle that a person filling an office cannot *aliene* the emoluments of the office to the prejudice of his successors. The alienation of lands attached to an hereditary office by the present holder of the office may be questioned by his successor within twelve years from the date when the succession to the office devolves on him. (Muppidi Rapaya *v.* Ramana, I. L. R., 7 Mad., 85; compare Babaji *v.* Nana, I. L. R., 1 Bomb., 535.) But a decree of a competent Court in a suit against the present *sebait* of an idol, in respect of the idol's property, is binding on succeeding *sebaits.* (Prosunno Koomaree *v.* Golabchand, 23 W. R., 253. P. C.) As regards succeeding *mutwullees*, see 17 W. R., 430.

Where the plaintiff sues to enforce his own personal right to manage an endowment, dedicated to religious purposes, there being no question whether or not the property is being applied to such purposes by the manager in possession, sec. 10 is inapplicable. The possession of the defendant being adverse, the suit might fall within art. 124 or art. 144. (Balwant *v.* Puran, I. L. R., 6 All., 1, P. C.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 125.—Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her remarriage. | Twelve years ... | The date of the alienation. |

No. 125. (No. 124, Act IX.) As to the exceptional nature of declaratory suits of this kind, see Ishri Dutt *v.* Hansbatti, I. L. R., 10 Calc., 324. In the Punjab, Muhammadan widows succeed to their husbands' lands

when there are no descendants in the male line, for life, or till they marry again.

As to the effect of the remarriage of Hindoo widows, see sec. 2, Act XV of 1856.

Article 125 does not apply to suits by persons other than the *immediate* reversioner. The suit under this article must be brought by the presumptive heir, who would be entitled, *if* the female *died* at the date of instituting the suit. (See I. L. R., 10 Calc., 324, 334, P. C.) The next reversionary heir cannot *set aside* the deed of alienation, because it is *partly* valid; nor can he affect the *possession*, which the female has a right to keep or to give up to another. (*Ibid*, p. 332; compare Jowla *v.* Dharum, 10 Moore I. A., 511.) The cause of action for a declaration that the alienation is void *pro tanto* is not revived in favour of reversioners who are born after the expiry of twelve years from the date of alienation. (Pershad *v.* Chedeelall, 15 W. R., 1.) On the *death* of the female, a separate cause of action for immediate *possession* of the property accrues to the reversioner. (See art. 141, and Prosunno *v.* Afzolonnessa, I. L. R., 4 Calc., 523.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 126.—By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property. | Twelve years ... | When the alienee takes possession of the property. |

No. 126. (No. 125, Act IX.) Limitation runs not from the date of the alienation, but from the time when *possession* is taken by the alienee. (See Raja Ram *v.* Luchman, 8 W. R., 15, F. B.; Munbasi *v.* Nowrutton, 8 C. L. R., 428.)

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| 127.—By a person excluded from joint family property to enforce a right to share therein. | Twelve years | When the exclusion becomes known to the plaintiff. |

No. 127. . (No. 127, Act IX; cl. 13, sec. 1, Act XIV.) Under Act XV of 1877, time does *not* run from the *death* of the persons from whom the property alleged to be joint is said to have descended, nor from the date of the last *payment* to the plaintiff by the possessor or manager of such property, nor from the date when the plaintiff claims and is *refused* his share.

For the law under Act XIV of 1859, see Gossain Dass *v.* Serookoomaree, 19 W. R., 192; Govindan Pillai *v.* Chidambara, 3 Mad., 99; Lakshman Dada *v.* Ramchundra Dada, I. L. R., 5 Bomb., 48, P. C.; Hansji *v.* Valabb, I. L. R., 7 Bomb., 297. Under Act IX of 1871, time did not run against the plaintiff until he had claimed and been refused his share; consequently, if a plaintiff had been excluded for fifty years, and he then claimed his share and was refused, he would have had twelve years from the time of such refusal to bring his suit; or, in other words, he would have had sixty-two years from the time of his exclusion; and if he never claimed or was refused, the period within which he might bring his suit was indefinite. (Kalikishore *v.* Dhununjoy, I. L. R., 3 Calc., 228; Hansji *v.* Valabb, I. L. R., 7 Bomb., 297.) The time allowed under

ARTS. 128, 129.

*this* article is *shorter* within the meaning of sec. 2. (See notes to that section.)

This article applies to Hindus as well as to Muhammadans. But the Hindu law presumption in favor of joint property does not apply to Muhammadans in Bengal, except where they have adopted the Hindu law of property. (Abdool *v.* Mahomed, I. L. R., 10 Calc., 562.)

The suit contemplated by art. 127 is a suit against alleged co-sharers and managers of joint property, where the question of "joint or not" is the main question between the parties. (See 15 W. R., P. C., 24; and p. 185, *supra*. Issuri Dutt *v.* Ibrahim, I. L. R., 8 Calc., 653.)

The article presupposes the existence of joint family property, and that there has been an exclusion from participation in the enjoyment of it. The words "excluded" and "exclusion" imply previous inclusion. (Saroda *v.* Doyamoyee, I. L. R., 5 Calc., 938.)

If, at the time when the suit is brought, the plaintiff and defendant are not members of a joint Hindu family, the *plaintiff must prove* that the property in dispute is joint family property. It is not enough for him merely to *call* it joint family property, and to show that 13, 30, or 100 years ago he, or his ancestors, and the defendant, or his ancestors, were joint. If the defendant has been in *exclusive* possession for upwards of twelve years, he has a *primâ facie* right to the property. If the plaintiff wants to bring himself within art. 127, which places him in a more advantageous position than other claimants, he is bound to show that the share which he seeks to recover was, at some time, *joint property*. It is not sufficient to show that, at some prior period, the common ancestors of the parties were members of a *joint family*. (Obhoy Churn *v.* Gobind Chunder, I. L. R., 9 Calc., 237.) If it appears that the defendant has been in *exclusive* possession for twelve years to the *knowledge* of the plaintiff, the suit is barred by art. 127. Time does not run against the plaintiff until his exclusion from the property becomes *known* to him. (Hari *v.* Maruti, I. L. R., 6 Bomb., 741; Issuri Dutt *v.* Ibrahim, I. L. R., 8 Calc., 653.) The property in dispute, whether moveable or immoveable, must appear to have been joint family property at the date when the plaintiff was, to his knowledge, excluded from participation in it. Otherwise art. 127 is inapplicable. (See Thakur *v.* Partab, I. L. R., 6 All., 442, 443.)

The *exclusion* spoken of in this article is, probably, a *total exclusion* from the joint family property. (See I. L. R., 5 Bomb., 48, 60, P. C.; 14 B. L. R., 373, P. C.)

As to when the possession of a member of a joint family becomes adverse to the others, see p. 167, *supra*.

The mere fact that there has been no division of the property during six or seven generations does not deprive the members of an undivided family of the right to demand a partition. (Thakur Durria *v.* Thakur Davi, 13 B. L. R., 165, P. C.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 128.—By a Hindu for arrears of maintenance. | Twelve years ... | When the arrears are payable. |
| 129.—By a Hindu for a declaration of his right to maintenance. | Ditto ... | When the right is denied. |

*Part VIII.—Twelve years.*



Nos. 128 and 129. (No. 128, Act IX; cl. 13, sec. 1, Act XIV.) These articles do not apply to Muhammadans or Christians. (See notes to art. 120.) Where the maintenance claimed by a Hindu or *other* plaintiff is *charged* upon immoveable property, art. 132 applies. (See Ahmad Hossein *v.* Nihaluddin, I. L. R., 9 Calc., 945, P. C.)

Clause 13, sec. 1, Act XIV of 1859, applied only to cases where, by will or otherwise, the maintenance claimed was made a specific charge on the inheritance of any estate. (Narayanrao *v.* Ramabai, I. L. R., 3 Bomb., 415, 420, P. C.) Other cases were governed by the six years' rule. (Kalo Nilkantho *v.* Lakshmibai, I. L. R., 2 Bomb., 637.) By the Hindu common law, the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies. A statute of limitation might do much harm if it should force widows to claim their strict rights and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable. (I. L. R., 3 Bomb., 420, P. C.) Under Act IX of 1871, if it appeared that there had been a demand and refusal, the plaintiff could recover arrears of maintenance for twelve years only from the date of such *demand and refusal.* (Jivi *v.* Ramji, I. L. R., 3 Bomb., 207.)

Under Act XV of 1877, a Hindu's suit for arrears of maintenance must be brought within twelve years from the time when the *arrears are payable.* Unless maintenance has been actually withheld under circumstances amounting to refusal, no action lies for arrears. (I. L. R., 3 Bomb., 421, P. C.)

If a suit for the declaration of a *right* to maintenance is barred by art. 129, by reason of the defendant having *denied* the right more than twelve years before the institution of the suit, a suit for subsequent arrears may be barred on the principle of the decision in the case of Chhaganlall *v.* Bapubhai, I. L. R., 5 Bomb., 68. But as the right to maintenance is *not extinguished* by sec. 28, this question is not free from doubt. (See the remarks of the Privy Council in Maharana Futtehsanji *v.* Desai Kullianraoji, 21 W. R., 178, 182, P. C.)

"When the right is *denied.*"—A denial made in *answer* to a demand is a *refusal.* Even if maintenance has not been demanded by the plaintiff, his right may be *denied* by the defendant, and limitation under art. 131 will run from the date of the denial. (See I. L. R., 7 Mad., 348.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 130.—For the resumption or reassessment of rent-free land. | Twelve years ... | When the right to resume or assess the land first accrues. |

No. 130. (No. 130, Act IX; cl. 14, sec. 1, Act XIV.) There is some difference of opinion as to whether the term 'rent-free' is equivalent to 'revenue-free.' Sir B. Peacock, C.J., Jackson and Macpherson, JJ., held, that a 'rent-free' tenure granted by the zemindar was not 'revenue-free' within the meaning of sec. 10, Reg. XIX of 1793, and that such a tenure could not be resumed or assessed by the heir of the grantor or a purchaser from him by private sale of the zemindary. (Mahomed *v.* Asadunnissa, 9 W. R., 1, F. B.) But in sec. 30, Act XVIII of 1873, and sec. 79, Act XIX of 1873, the Legislature uses the words "exempt from payment of *rent*" when it refers to the law of the old Regulations; and in Jaganath *v.* Prag Sing, Stuart, C.J., Pearson and Oldfield, JJ., held, that a 'rent-free' tenure, the revenue of which the

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VIII.—Twelve years.*

ART. 130. grantor took upon himself to pay, was void, and liable to resumption by the grantor's representatives, under sec. 10, Reg. XIX of 1793, and other Regulations and Acts. (I. L. R., 2 All., 365, F. B.)

In this article "rent-free land" means a *lakheraj* holding, whether created before or after the 1st December 1790. (See Nobin *v.* Janokee, 2 W. R., Act X, 33; Kristo *v.* Joy, 3 W. R., 33.)

For a review of the law relating to lakheraj tenures in the permanently-settled provinces, see Nobokristo *v.* Koylaschunder, 20 W. R., 459, P. C.; and Koylash Bashini *v.* Gocoolmoni, I. L. R., 8 Calc., 230.

For a summary of the rules of limitation applicable to suits for resumption or assessment under the Regulations and under Act XIV of 1859, see Thompson, 2nd Ed., pp. 205, 206; and 1 Hay, 26; 5 W. R., P. C., 1; 7 W. R., P. C., 21; 4 W. R., 53; Calc. Sud. Dew., 1855, p. 501, F. B.; 1861, Vol. I, p. 151.

Where no rent has ever been fixed on or paid for a tenure, and the holder has been in possession for more than twelve years after the right to assess accrued to the zemindar, he is entitled to hold rent-free. (Abhoy *v.* Kally, I. L. R., 5 Calc., 949; see p. 329, *supra.*) This rule does not apply to a suit for *assessment* of rent where a *declaratory* decree for resumption has been obtained against the defendant. (2 C. L. R., 569.)

Ancient lakheraj tenures within an estate cannot now be resumed or assessed except by an auction-purchaser of the estate at a revenue-sale. Suits by such a purchaser and his representatives are barred if more than twelve years have elapsed from the date of the sale becoming final and conclusive. (See art. 121.) By Act XIV of 1859 and Act IX of 1871, it was provided that, even as against an auction-purchaser at such a sale, the lakherajdar would be protected if he proved a rent-free holding from the time of the Permanent Settlement. This proviso is omitted in Act XV of 1877, probably because such a rent-free holding is not an "encumbrance imposed *after* the time of Settlement" within the meaning of sec. 37, Act XI of 1859, and is not therefore liable to be avoided by an auction-purchaser. Notwithstanding the repeal of sec. 3, cl. 3, Reg. II of 1805 by Act VIII of 1868 (see I. L. R., 9 Calc., 416), in Koylas Bashinee's case (I. L. R., 8 Calc., 230), a Division Bench of the Calcutta High Court held that sixty years' possession as lakheraj would bar the auction-purchaser's suit for resumption or assessment of lakhiraj tenures created after 1st December 1790. But tenures created by the old zemindar *after* the permanent settlement of the estate are, *without any restriction*, liable to be avoided, if only the suit is not barred by art. 121. In the permanently-settled districts, the right to resume or assess lakheraj land, not exceeding 100 bigahs, and held under an invalid grant of a date *preceding* the 1st December 1790, accrued to the original engager on the date of the Settlement.

As to lakheraj lands, whether exceeding 100 bigahs or not, held under a grant of a date *subsequent* to the 1st of December 1790, the right to resume or assess also accrued to the original proprietor on the date of the Settlement, if the lakheraj holding was in existence on that date. Before Acts X and XIV of 1859 came into operation, such suits were governed only by the sixty years' rule laid down in Reg. II of 1805.

The right to resume or assess lakheraj holdings, which have come into existence since the date of the Permanent Settlement, accrued to the original engager, or his representatives, on the dates on which the lakherajdars commenced to hold the lands as lakheraj. But an auction-purchaser of the estate at a revenue-sale always gets a new start. See Gungadhur *v.* Satcowrie, Calc. Sud. Dew. Rep. for 1850, p. 501, F. B.,

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in which it was decided, that, even as regards lakheraj grants made before 1790, the auction-purchaser's suit was not barred by limitation if brought within twelve years of his purchase. By the Act of 1859, this ruling was so far modified that *no* suit for resumption or assessment could be maintained if the lakherajdar proved that the land had been held rent-free from the period of the Permanent Settlement.

The right of Government to assess invalid lakheraj tenures exceeding 100 bigahs, and held within the ambit of a permanently-settled estate, under grants of dates preceding the 1st of December 1790, has long since been extinguished by the sixty years' limitation.

If the zemindar is barred by limitation, a putnidar or durputnidar deriving his right to sue from the zemindar is also barred. (See 3 W. R., 33; 15 W. R., 436.) If the general right of Government to assess lakheraj land within the ambit of a khas mehal is extinguished by limitation at the date of the settlement of the khas mehal, the person with whom the settlement is made can have no right to assess such land.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 131.—To establish a periodically recurring right. | Twelve years | When the plaintiff is first refused the enjoyment of the right. |

No. 131. (No. 131, Act IX.)

The right to receive payments periodically, *e.g.*, annuities, dividends, interest, mālikana (6 C. L. R., 133; I. L. R., 10 Calc., 697), maintenance or rent (p. 329, *supra*), is a periodically recurring right. So also the right to *palas*, or turns of worship (I. L. R., 4 Calc., 683; I. L. R., 8 Calc., 807), the right to recover burial fees whenever a corpse is brought for burial (24 W. R., 385), and the right to the enjoyment of a *watan* in rotation by different sharers (4 Bomb., 51) are periodically recurring rights. A suit for *arrears* of periodical payments should, however, be distinguished from a suit to *establish the right* to receive these payments. (See p. 329, *supra*.) A suit by a Hindu to establish his *right* to *maintenance* is *specially* provided for by art. 129.

A general *denial* of the right does *not* amount to a *refusal*. A refusal must be made in *answer* to a *demand* by or on behalf of the plaintiff. (Ramnad *v.* Dorasami, I. L. R., 7 Mad., 341, 343.)

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| 132.—To enforce payment of money charged upon immoveable property.<br>*Explanation.*—The allowance and fees respectively called *mālikanā* and *haqqs* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property. | Twelve years | When the money sued for becomes due. |

No. 132. (No. 132, Act IX.) See the notes under arts. 62, 63, 111, and 147.

Under Act XIV of 1859, a suit for *money* charged upon immoveable property by way of a simple mortgage was governed by the six years' or

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the three years' rule, according as the covenant to pay was duly registered or not, provided the plaintiff claimed to recover the money merely as a debt, and did not seek to realize his lien. But a suit in which the relief sought was the recovery of the mortgage-money by a declaration of the lien and a sale of the mortgaged property, was dealt with under cl. 12, sec. 1, as a suit for the realization of an *interest in land*, and as governed by the twelve years' rule. Such a claim, specially where the defendant is a subsequent purchaser of the mortgaged land, is founded not upon the contract to pay the money, but upon the hypothecation of the land. (2 Mad., 51, 307; Surwan Hossein *v.* Sharoda Gholam Mahomed, 9 W. R., 170, F. B.; Pearee Mohun *v.* Gobind Chunder, 10 W. R., 56; Janeswar *v.* Mahabeer, 25 W. R., 85, P. C.; I. L. R., 1 Calc., 162.) The provisions of Acts IX and XV were evidently not intended to interfere with, but rather to give, legislative authority to that which previously rested on judicial decisions only. And most of the Courts in India took this view of the matter. (See Radho *v.* Musst. Roop, 7 N. W. P., 223; Raghubar *v.* Luchmin, I. L. R., 5 All., 461, 462; In the matter of T. Agabeg, 12 C. L. R., 165, 168; Pestonji *v.* Abdool, I. L. R, 5 Bomb., 463.) But Westropp, C. J., and Melville, J., on the 16th of July 1877 (see I. L. R., 6 Bomb., 720), held, that the words "suit for money charged upon immoveable property," in art. 132, Act IX, were wide enough to be applicable to the *personal* remedy on the contract to pay, *as well as* to the remedy against *the land*. It may be observed that this *literal* interpretation of the law is supported by two recent decisions in England on the construction of the words "suit to recover any sum of money secured by any mortgage" in sec. 8 of the English Real Property Limitation Act, 1874. (See Sutton *v.* Sutton, 22 Ch. Div., 511: Fearnside *v.* Flint, 22 Ch. Div., 579.) It was, probably, with a view to obviate this ambiguity (which is also referred to in Forsyth *v.* Bristowe, 8 Exch., 716) that the language of art. 132 was changed in 1877. Now, the words of the first column are "suit to *enforce* payment of money charged upon immoveable property." Sargent, J., in I. L. R., 5 Bomb., 463, Norris, J., in 12 C. L. R., 165, and Straight, J., in I. L. R., 5 All., 461, substantially held that, whatever might be the proper interpretation of art. 132, Act IX, the altered language of the law in Act XV was applicable *only* to the enforcement of the hypothecation against the *land*; and that as regards the remedy against the *person* of the mortgagor, the plaintiff had the same shorter period of limitation which was allowed for the recovery of ordinary debts. If the words of art. 132, Act XV of 1877, were, "suits to *enforce a charge* upon land" or "suits to enforce payment of money charged upon land, *so far as it is a charge*," the language of the law would have been *strictly* consistent with the *current* of decisions. But as the actual language of the law is *still* applicable to suits for purely money-decrees, in respect of debts charged upon immoveable property, it has been recently held by a Full Bench of the Bombay High Court (though with some hesitation), that this literal construction ought to be adopted, the more specially as it is in *favor* of the right to sue. According to this ruling, even a suit to obtain a mere money-decree for a debt secured by a simple mortgage is governed by the twelve years' rule, under art. 132, Act XV. (See Lallubhai *v.* Narain, I. L. R., 6 Bomb., 719; see also I. L. R., 6 Mad., 417.) In Raghubar *v.* Luchmin (I. L. R., 5 All., 461), Straight and Brodhurst, JJ., refer to this Bombay ruling, but say that the current of decisions being the other way, they are not prepared to depart from those decisions. And in Shiblal *v.* Ganga Persad, Oldfield, J., entirely dissented from the Bombay ruling. (See I. L. R., 6 All., 556.) But in Muhammad

Zaki *v.* Chatku (I. L. R., 7 All., 120), Straight, C.J., and Duthoit, J., follow and approve the view of the law taken by the Full Bench of the Bombay High Court.

The introduction of art. 147, in sched. ii of the Limitation Act, 1877, has created another difficulty in the interpretation of art 132. It is not likely that the Legislature, by enacting art. 147, intended to give a simple mortgagee an extended period of *sixty* years for the recovery of the mortgage-debt by the sale of the property mortgaged, when it was well known that from 1793 to 1877, a mortgagee had been allowed a period of *twelve* years only in such cases. In England, the Real Property Limitation Act, 1874, has *reduced* the period prescribed for such a suit from twenty to twelve years, and it is not at all probable that the Indian Legislature, while striving to make the Indian law agree with the English law (see Abstract of the Proceedings of the Council of the Governor-General of India on the 19th July 1877) should think of *raising* the period from twelve years to sixty years. A simple mortgagee, as such, cannot sue for *foreclosure;* a usufructuary mortgagee, as such, cannot sue for *foreclosure or sale;* and at the time when Act XV of 1877 was passed, a mortgagee by conditional sale could not, under the Bengal Regulations, institute a *suit* for foreclosure. At the time when the Act was passed, only an English mortgage authorized the mortgagee to sue for *foreclosure or sale* in the manner prescribed by Form 109, sched. iv, Act X of 1871. Article 147 of Act XV of 1877 was, probably, *intended* to apply to a mortgagee who was entitled to institute a suit for *foreclosure*, and who *might* obtain a decree for *sale* instead. In this view, a suit to realize the lien created by a simple mortgage is not a suit for *foreclosure or sale* within the meaning of art. 147. But as the words "suit for foreclosure *or* sale" may be read distributively, and a suit to realize a lien or charge created by a simple mortgage is virtually a suit for the *sale* of the mortgaged property, it has been held by a Full Bench of the Allahabad High Court, that a suit upon a bond for money, by which immoveable property is hypothecated as security for the debt, wherein the relief prayed is recovery of the amount with interest, by establishment of the right to enforce the hypothecation by auction-sale of the interest of the obligor in such property, is governed by art. 147. It has been also held by the same Court that art. 132 applies to a *charge* which does not amount to a *mortgage*. (Shib Lal *v.* Ganga Prasad, I. L. R., 6 All., 551, F. B.) It cannot, however, be denied that money lent on *mortgage* is, in *ordinary* legal phraseology, money *charged* upon immoveable property (I. L. R., 6 Bomb., 719, 724); and that no distinction between a *mortgage* and a *charge* had been drawn in any legislative enactment at the date of the passing of Act XV. Turner, C.J., and Innes, J., agree with the Bombay High Court in holding (with some hesitation) that a charge created by a simple mortgage is a charge within the meaning of art. 132. (Davani *v.* Ratna, I. L. R., 6 Mad., 417.)

Petheram, C.J., is of opinion that a *rehan* which does not expressly or impliedly *give the lender himself* any right to cause the property to be sold, creates only a *charge* on the property. Other Judges of the Allahabad High Court hold that an ordinary *rehan* is a simple *mortgage* within the meaning of Acts IV of 1882 and XV of 1877. (See I. L. R., 7 All., 258, F. B.)

The Bombay High Court, in the Full Bench case (I. L. R., 6 Bomb., 717, 723), observed that it might well be *doubted* whether art. 132 was intended to apply to *mortgages* at all, inasmuch as art. 147 had introduced a special provision not contained in previous Acts, for a suit by a mortgagee for foreclosure or sale.

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I am not aware of any decision of the Calcutta High Court in which art. 147 has been applied to any suit by a *simple* mortgagee, or art. 132 applied to a suit for a *mere* money-decree. In a suit by the mortgagee, on a mortgage-bond, to recover the balance of the mortgage-debt, in which the plaintiff prayed for a decree against the mortgaged property only, Rattigan, J., of the Punjab Chief Court, held, that art. 147 was applicable. Barkley, J., of the same Court, on the other hand, held, that art. 132, and not art. 147, governed the case, as the plaint was not in the form prescribed by the 4th schedule of the Civil Procedure Code, No. 109, and the prayer in the plaint could not be regarded as a prayer for the sale of the property and payment out of the proceeds, such as is provided for by the prescribed form, but rather that the sum due should be ascertained and declared a charge on the property. (Ram Nath *v.* Musst. Jio, Punj. Rec., No. 101 of 1880; Rivaz, p. 178.)

A suit to enforce a charge created by a mortgage-bond, against a party who holds the land under a title *distinct* from that of the mortgagor, is not governed by this article, but by art. 144. (See Karan Singh *v.* Bakar Ali Khan, I. L. R., 5 All., 1, P. C.) Article 132 does not also apply to cases falling within art. 111, nor to suits for money charged upon *moveable* property.

A *charge* created by operation of law, not amounting to a mortgage, is, without any difference of opinion, a charge within the meaning of art. 132. A person who has such an *interest* in an estate or a dependent talook (as a co-sharer, an undertenure-holder, or a mortgagee) as *entitles* him to pay the revenue due to the Government, or the rent due to the zemindar, and does actually pay it, is thereby entitled to a charge on the estate or talook, as against all persons interested therein, for the amount of the money so paid. (8 W. R., P. C., 17; 1 C. L. R., 152; 22 W. R., 411; I. L. R., 6 Calc., 549; 6 C. L. R., 28; 8 C. L. R., 210.) If the amount is sought to be *charged* on the land, it may be sued for within twelve years under art. 132. (See I. L. R., 6 Calc., 549; and the notes to art. 99.) Under the provisions of sec. 171 of the Bengal Tenancy Act, money so paid to prevent the sale of a tenure, is *deemed* a *mortgage*-debt.

In the generality of cases, the right to *contribution* is a *personal* right and the remedy is a *personal* one, and there is no *lien* for the amount of the monies in respect of which the right to contribution arises. This was determined by Lord Eldon after great consideration, in the case of part owners of a ship, in *ex parte* Young and *ex parte* Harrison, in which he overruled the previously expressed opinion to the contrary of Lord Hardwicke. (*In re* Leslie *v.* French, 23 Ch. D., 552, 563.)

A suit for *interest*, which has been made a *charge* upon immoveable property, is governed by this article. (See the cases noted under art. 63.) But where the *charge* amounts to a *mortgage* within the meaning of art. 147, sixty years' interest may be taken into account.

*Malikana.* A malikana right is, generally, the right to receive from the Government a sum of money, which represents the *malik's* share of the profits of an estate not permanently settled, when from his declining to pay the revenue assessed by the Government, or from any other cause, his estate is taken into the *khas* possession of Government, or transferred to some farmer or ijaradar. (See Mullick *v.* Muleka, I. L. R., 10 Calc., 1112, 1125. As to suits for *malikana*, see 21 W. R., 88; 22 W. R., 551; and I. L. R., 5 Calc., 921.)

Suits for *malikana* and *haks* are ordinarily suits for mere *money*-decrees (I. L. R., 6 Bomb., 719, 724), although, for the purposes of art. 132, the allowances and fees so called are *deemed* to be money *charged* upon immoveable property. According to Spankie, J., the *haqqs* referred

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to in the explanation *are* fixed charges upon immoveable property, of which payment *could* be enforced by the sale of the property so charged, and *haqq-i-chaharam* (a zemindari due customarily payable on the sale of a house situated in the mehal) is not a *haqq* within the meaning of this article. (Kirath *v.* Ganesh, I. L. R., 2 All., 358, 361.)

As to *Palki haks & Tora Garas haks* in the Bombay Presidency, see 14 Moore I. A., 551; L. R., 1 I. A., 34; 21 W. R., 178.

Fees attached, as of right, to hereditary offices are often called *haks*.

This article applies to suits which are brought by a *hakdar* against the person *originally liable* for payment of the *hak*, and not to suits against persons who have actually realized the *hak*, which is payable to the plaintiff. A suit of the *latter* description is a suit for money had and received under art. 62. (Harmukhgouri *v.* Harisukprosad, I. L. R., 7 Bomb., 191; Morbhat *v.* Gangadhar, I. L. R., 8 Bomb., 234; Desai *v.* Desai, I. L. R., 8 Bomb., 426; Dulabh *v.* Bansi, I. L. R., 9 Bomb., 111.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 133.—To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration. | Twelve years ... | The date of the purchase. |
| 134.—To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration. | Ditto ... | Ditto. |

Nos. 133 and 134.- (Nos. 133 and 134, Act IX; sec. 5, Act XIV.)

These articles are now *expressly* made applicable to trusts created by *will*. (See p. 188, *supra*.) It is no longer necessary that the purchaser, in order that he may be protected by these articles, should be a purchaser in *good faith*. (See p. 188, *supra*, and the notes to sec. 10.) The purchase, however, must purport to be a purchase of the property as an *absolute* property, and not merely as property mortgaged, deposited, or entrusted. In the case of mortgaged property, for instance, it must not purport to be a mere *assignment of the mortgage*; and the *onus* is on the purchaser to show this. (See pp. 131, 161, 188, *supra*.) If the mortgagee, instead of selling the property, *mortgages* it as if it were his *absolute* property, this *mortgage* will perhaps be treated as a *sale* within the meaning of art. 134. If this article is not applicable to such a case, art. 144 must be held to be applicable.

As to when the possession of an alienee from the *mortgagor*, specially where such alienation is not a *voluntary* act of the mortgagor, becomes adverse to the mortgagee, see p. 160, *supra*; and compare Manly *v.* Patterson, I. L. R., 7 Calc., 394; and Sobhagchand *v.* Bhaichand, I. L. R.,

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6 Bomb., 193. Even a purchaser at an ordinary *judicial* sale, under a mere money-decree, can hardly be regarded as a *bonâ fide* purchaser of an *absolute* interest *without notice*. (I. L. R., 6 Bomb., 193, 205.)

Articles 133 and 134 do not provide for the case of purchasers from *mortgagors*, nor for the case of purchasers who buy property in good faith from a person guilty of *concealed fraud* under sec. 18. (See p. 164, *supra*; and the notes to sec. 18.)

These articles reduce to twelve years the periods to which the depositor, pawnor, or mortgagor would be otherwise entitled under arts. 145 or 148.

Section 5 of Act XIV of 1859 provided that, in the case of purchase from a depositary, pawnee, or mortgagee, no suit for the recovery of the property from the purchaser should be maintained, unless brought *within* the time allowed for such a suit against the depositary, pawnee, or mortgagee himself. This proviso has been omitted in the Acts of 1871 and 1877, probably as unnecessary.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 135.—Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged. | Twelve years ... | When the mortgagor's right to possession determines. |

No. 135. (No. 135, Act IX.) See pp. 160 to 164, *supra*, and the notes to art. 134, as to adverse possession in mortgage cases.

Article 146 applies to similar suits in Courts established by Royal Charter.

Under Act IX of 1871, art. 135 gave a period of twelve years from the time when the mortgagee was *first* entitled to possession. This very unfortunate provision in the Act of 1871 has been corrected by the Act of 1877. (Ghinarain *v.* Ram Monoruth, 7 C. L. R., 580, 581.) This *amended* article meets the case of the mortgagor and mortgagee agreeing to go on upon the footing of the mortgage after the mortgagee is *first entitled* to possession. Under the present Act, the payment and acceptance of interest, it is apprehended, might be evidence of the *continuance* of the relation between the parties created by the mortgage-deed. Until the mortgagor or his representative advances any rights adverse to the mortgagee, the possession of the mortgagor or his representative is not adverse to the mortgagee. (See Mankee *v.* Shikh Munnoo, 22 W. R., 543; and the P. C. cases cited therein.) The mortgagor's right to possession *determines* when the terms of the mortgage entitle the mortgagee to take possession, *or* if the parties agree to go on upon the footing of the mortgage when such agreement comes to an end, *or* when the mortgage is foreclosed. It should be remembered that a foreclosure is considered as a *new* purchase of the land, and that the effect of an order of foreclosure is to vest the *ownership and beneficial title* to the mortgaged land for the *first* time in the mortgagee; so that an action for possession as owner, brought within the ordinary period next after the order of foreclosure (against the mortgagor himself or any person who claims or is entitled to claim the equity of redemption only), is not barred by limitation, although more than the ordinary period has elapsed since the mortgagee was first entitled to possession. (See Pugh *v.* Heath, 6 Q. B. D., 345; S. C. on appeal, 7 App. Cas.,

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235.) There can be no two things more distinct or opposite than possession as *mortgagee*, and possession as *owner* of the estate (*ibid*). The recovery of possession by the mortgagee *as mortgagee* does not extinguish the incumbrance, whilst redemption by the mortgagor or foreclosure by the mortgagee undoubtedly has such effect. (I. L. R., 6 All., p. 559.) When the mortgagee takes possession of the mortgaged property, not as owner after foreclosure, but *as mortgagee* under the terms of the deed of mortgage, he is *accountable* to the mortgagor for the profits which he receives. (22 W. R., 90-92.) The suit provided for by art. 135 is a suit by the mortgagee for possession *as mortgagee*. (7 C. L. R., 580; I. L. R., 6 Calc., 564.) It has been held that if a mortgagee, who may sue for possession, as mortgagee, under the terms of the mortgage, within the time allowed by this article, *commences* foreclosure proceedings and thus takes steps to *alter* his position or character *within* such period, he will, under art. 144, be entitled to another twelve years from the date of such *change* of character. (7 C. L. R., 580, 581.) In Dinonath *v.* Nursing, 22 W. R., 90, the mortgagee not having taken foreclosure proceedings within twelve years from the date when he was first entitled to possession under the terms of the mortgage, and the defendant being an execution-purchaser of the mortgaged property, who asserted an *absolute* right in himself, it was held that the foreclosure proceedings gave the mortgagee *no fresh* right to sue for possession. In Madun Mohun *v.* Ashad Ali, I. L. R., 10 Calc., 68, it would appear to have been laid down that unless the mortgagee's character is *changed* into that of an absolute owner (by the *expiry* of the year of grace under the Regulations) *within* the twelve years allowed by art 135, he cannot, even in a suit for possession against the mortgagor himself, claim a fresh start from the date of foreclosure. In Pugh *v.* Heath, 6 Q. B. D., 345, in which a mortgage, in England, had been absolutely foreclosed shortly *after* the expiry of the ordinary period of limitation allowed to a mortgagee to sue for possession, Lord Selborne laid down generally that the order of foreclosure gave the mortgagee a fresh start to sue for possession as absolute owner. When the defendant is a *bonâ fide* purchaser without notice of the mortgage, and as such holds the property *adversely* to the mortgagee, the mortgagee is not entitled to a fresh start, simply because he has changed his character by taking foreclosure proceedings. (See 16 W. R., P. C., 19 and 33; 22 W. R., 90.) On the other hand, when the defendant claiming under the mortgagor does not advance a title inconsistent with the mortgage, but asserts only a title to redeem the mortgage, foreclosure proceedings under the Regulation, taken *after* the expiry of twelve years from the date of default, are not necessarily too late. (See 4 W. R., P. C., 37.) In fact, as against persons claiming the equity of redemption only, no time had been prescribed by the law for taking foreclosure proceedings under the Regulations. Under the present law, *suits* for foreclosure are governed by the sixty years' rule.

In the case of a mortgage, the terms of which do *not* entitle the mortgagee to take possession before the mortgage is foreclosed, the mortgagee may sue for possession as owner within twelve years from the date of foreclosure, or the expiry of the year of grace allowed by the Regulations. (Noonoo *v.* Lalla, 1 Shome, 21; Modun *v.* Ashad, I. L. R., 10 Calc., 68.) And even if the mortgagee is, under the *terms* of the mortgage, entitled to possession *before* the mortgage is foreclosed, if the mortgagee does not take possession, but makes some *new arrangement* with the mortgagor, by which the latter is *allowed* to retain possession, the possession thus continued by the morgagor cannot be considered adverse

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to the mortgagee, and limitation will not run against him during its continuance. (22 W. R., 543; 1 Shome, 21.) But if the defendant in possession of the mortgaged property is a party who asserts a title inconsistent with, and adverse to, the title of the mortgagee, and has been in adverse possession for more than twelve years, the mortgagee's suit for possession must be dismissed under art. 144, although it is brought within twelve years of the foreclosure of the mortgage. As to what constitutes adverse possession in such cases, see p. 160, *supra*.

When there are two different mortgages of the same property, the *puisne* encumbrancer may have a *fresh* right to sue for possession *as mortgagee*, in case the mortgagor redeems the first mortgage and recovers possession from the first mortgagee. (Narain *v.* Simbhoo, I. L. R., 1 All., 325, P. C.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 136.—By a purchaser at a private sale for possession of immoveable property sold, when the vendor was out of possession at the date of the sale. | Twelve years ... | When the vendor is first entitled to possession. |

No. 136. (No. 136, Act IX.)

A purchaser at a private sale cannot count limitation from the date of his purchase, but from the date of accrual of his vendor's right to sue. (Bhikaree *v.* Ajoodhya, 3 W. R., 176.) Auction-purchasers at a sale for arrears of revenue or rent are in this respect entitled to a special privilege. (See notes to art. 121, and I. L. R., 4 Calc., 103; 10 W. R., 15, 19.) As to when a claim for possession is not independent of the right to sue for specific performance of the contract of sale, see the notes to art. 113.

A suit for possession by the vendee against the vendor, when the vendor was in possession of the property at the time of sale, is not governed by this article. Article 144 will apply to such a case, and the possession of the vendor will be deemed to be adverse from the time when the ownership passed to the vendee. See I. L. R., 11 Calc., 229.

| | | |
|---|---|---|
| 137.—Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale. | Twelve years ... | When the judgment-debtor is first entitled to possession. |
| 138.—By a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale. | Ditto ... | The date of the sale. |

Nos. 137 and 138. (Nos. 137 and 138, Act IX.) See the notes to art. 136. An execution-purchaser is, in *general*, treated as a private purchaser.

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See 12 Moore I. A., 336, the notes under the terms "plaintiff" and "defendant" in sec. 3, and Donendro *v.* Ramcoomar, 10 C. L. R., 281, P. C. Compare Sobhagchand *v.* Bhaichand, I. L. R., 6 Bomb., 193, 205, F. B.

The execution-purchaser's suit against a third person, who has been in possession of the property (under an alleged private purchase from the judgment-debtor) is barred, if such third party has been in possession for twelve years. (Shambhubhai *v.* Shivlaldas, I. L. R., 4 Bomb., 89.)

If the judgment-debtor was in possession at the date of sale, the execution-purchaser may obtain possession in the execution department under secs. 318 and 319 of the Civil Procedure Code. Formal delivery of possession by the officer of the Court gives the purchaser a fresh start, so far as the judgment-debtor is concerned, but not against third parties. (See p. 136, *supra*; and Runjit *v.* Bunwaree, I. L. R., 10 Calc., 993.)

In Krishna Lall *v.* Radhakrishna, I. L. R., 10 Calc., 402, a Division Bench of the Calcutta High Court, while holding that an execution-purchaser may bring a *regular suit* for possession against the judgment-debtor, laid down that, if the formal possession obtained through the Court was not followed by any act of actual possession, the suit must be brought within twelve years from the date of sale under art. 138. But this is hardly consistent with the Full Bench Decision in I. L. R., 5 Calc., 584, as explained by the same Bench in Doyanidhi *v.* Kelai, 11 C. L. R., 395, 398. This question has been fully discussed in Shamachurn *v.* Madhub, I. L. R., 11 Calc., 93. For other cases under art. 138, see I. L. R., 4 Calc., 103 (which was decided before the Full Bench case referred to above); and I. L. R., 6 All., 75, cited under art. 91.

The plaintiff, in a case under art. 138, has no *right* to sue until the sale is *confirmed*, but time runs against him from the date of sale. (See pp. 227, 258, and 259, *supra*.) When the execution-purchaser obtains possession, but is afterwards dispossessed, art. 142 will apply.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 139.—By a landlord to recover possession from a tenant. | Twelve years ... | When the tenancy is determined. |

No. 139. (No. 140, Act IX.)

This article applies only when the land is in the possession of a person who was a *tenant* of the plaintiff. As to how a person who alleges a tenancy under the plaintiff can plead limitation, see 21 W. R., 70, F. B.; and I. L. R., 7 Bomb., 96. As to how and when the possession of the land becomes adverse to the landlord, see *supra*, pp. 147 *et seq.* Suits for arrears of rent are governed by art. 110.

Mere non-payment of rent does not constitute adverse holding. (See pp. 152 and 329, *supra*.) As against the landlord, possession is not adverse until the tenancy is properly *determined*. (See pp. 152, 153, *supra*.) The landlord may (under art. 144) sue a person who has dispossessed his lessee within twelve years of the expiry of the lease. (See pp. 154—158, *supra*, and Krishna *v.* Hari, I. L. R., 9 Calc., 367; Sheosohye *v.* Luchmeshur, I. L. R., 10 Calc., 577.)

Although the landlord cannot sue for *khas* possession so long as the tenancy continues, it is *open* to him to bring a suit against the trespasser for the purpose of having his rights *declared* as against such trespasser. (Bissesuri *v.* Baroda, I. L. R., 10 Calc., 1076.) It has been also laid down in this last case that the landlord may, in a suit against

the tenant and the trespasser, ask for the further relief that he should be placed in the same position "as before" as regards the tenant.

Article 139 refers to suits in respect of tenancies in which the leases have expired and so have terminated, or in respect of tenancies terminable by due notice. It does not refer to a suit by which the plaintiff seeks to recover possession by establishing that a permanent mokruree lease (granted by a preceding ghatwal) is invalid and not binding (as against a succeeding ghatwal). See Ajoodhya *v.* Collector, I. L. R., 9 Calc., 419.

The publication of a notice to quit in a local newspaper, under circumstances which make it highly probable that the notice in question has come to the knowledge of the tenant, is not, without more, such proof of service as will suffice to terminate the tenancy, or entitle the tenant to contend that he remained, after the date fixed by the notice for vacation, in *adverse* possession of the premises. (Chandmal *v.* Bochraj, I. L. R., 7 Bomb., 474.)

A landlord is generally a *reversioner*. But in the case of a permanent saleable undertenure. though rent is payable to the superior holder, he has no reversionary right in the land. (See Beejoy *v.* Kally Prosono, I. L. R., 4 Calc., 327.) A permissive occupation, which has very considerable *resemblance* to an English tenancy-at-will, is of frequent occurrence in this country. But we are not hampered here by the provision which has raised so many nice points in England under sec. 5 of the Statute of William the 4th, with regard to tenancies-at-will, *ceasing* at the end of the *first* year's occupancy. (Gobindlal *v.* Debendronath, I. L. R., 6 Calc., 311, 314, 316.) A tenancy-at-will created by A in favor of B is not *necessarily* determined on the death of either A or B. (I. L. R., 6 Calc., 311, 315; 4 Bomb., A. C., 155.) The possession of B's heirs may continue to be permissive. (*Ibid.*)

Every permissive occupation is *not* a *tenancy* within the meaning of art. 139. (I. L. R., 5 Calc., 679, 683.) Where one party is permissively in the occupation of land which belongs to another, although the period during which he had permission to occupy may have expired, no cause of action arises until one of two things has happened: either that there has been a demand of possession on the part of the owner, or that the owner's title has been denied by the permissive occupant. (Khurruckdharee *v.* Rewat Lall, 12 W. R., 167, 168.) So long as such occupation does not become *adverse* to the owner, limitation does not begin to run against him either under art. 142 or art. 144. (I. L. R., 6 Calc., 311.) Where once the relation of landlord and tenant is established, it is for the defendant to establish its determination by affirmative proof over and above the mere failure to pay rent. (See Prem Sukh *v.* Bhupia, I. L. R., 2 All., 517; and pp. 151, 152, *supra.*)

When the landlord is entitled to possession by reason of any forfeiture or breach of condition, before the expiry of the term of the lease, he must (under the Transfer of Property Act) do some act showing his intention to determine the lease; otherwise, the tenancy *continues*. (See sec. 111, Act IV of 1882.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 140.—By a remainderman, a reversioner (other than a landlord), or a devisee, for possession of immoveable property. | Twelve years ... | When his estate falls into possession. |

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*Part VIII.—Twelve years.*

ART. 140.

No. 140. (No. 141, Act IX.)

In the same land there may at the same time be an estate in *possession*, and one estate or several estates in *remainder*, and an estate in *reversion*. When the estate in possession is determined, the estate in remainder (if there be any), otherwise the estate in reversion, will become an estate in possession. (Wharton.)

Remainder.—That expectant portion, or residue of interest, which, on the creation of a particular estate, is at the *same* time conveyed away, by the owner, to another who is to enjoy it immediately after the determination of such particular estate. A remainder does not, like a reversion, arise by operation of law, but is always created by act of parties. (Wharton and Stephen.)

An estate in *reversion* is where any estate is derived by grant or otherwise, out of a larger one, *leaving* in the original owner an ulterior estate immediately expectant on that which is so derived. On the determination of the estate so derived by grant or otherwise, that is, on the determination of the *particular estate*, the possession returns or *reverts* to the original owner, who is for this reason called the *reversioner*.

A childless Hindu widow's estate is *not* a particular estate for life. She is more like a tenant-in-tail, and the so-called reversionary heirs are more like the issue-in-tail. As regards an *adverse* holder of the property, the issue-in-tail are barred by limitation, if the tenant-in-tail is barred, but the remainderman is not so barred. (Nobin Chunder *v.* Issur Chunder, 9 W. R., 505, 507, F. B.) Article 141, however, expressly gives the so-called reversionary heirs privileges similar to those which the remainderman or the reversioner is entitled to under art. 140. (See pp. 165-66, *supra*, and Sreenath *v.* Prosunno, 13 C. L. R., 372, F. B.; I. L. R., 9 Calc., 934. Cf. I. L. R., 9 Bomb., pp. 229—231.)

It may be that when an impartible estate vests in a joint family consisting of several coparceners, and is capable of enjoyment but by a *single* member at a time, the rights of survivorship vesting in the other coparceners cannot arise *as between themselves*, until each branch entitled to preferential enjoyment, according to seniority of descent, either becomes extinct or relinquishes its rights. But as between the joint family and *adverse* holders, the senior coparcener in enjoyment for the time being represents, for purposes of limitation, the entire joint family consisting of his lineal descendants and collateral coparceners. The representation of the junior members in the person of the senior member is *more complete* than the representation of a reversioner by a childless Hindu widow. Adverse possession, which bars the senior member, will, therefore, bar the junior members, although their right to the enjoyment of the property does not accrue until the senior member dies or relinquishes his rights. (Vigayasami *v.* Periasami, I. L. R., 7 Mad., 242.) A case such as this does not fall within the terms of either art. 140 or art. 141.

In the case of an endowment, where the founder granted lands to A and his descendants for the purpose of maintaining the worship of an idol, the management of the endowment being vested in the family of A, each member of such family succeeds to the management *per formam doni* (by the form of the gift), and it has been held that, in a suit to recover a share of the management by A's grandson against another member of the family, the plaintiff is not barred by limitation, simply because his deceased father would have been so barred. (Trimbak *v.* Narayan, I. L. R., 7 Bomb., 188.) But a succeeding *sebait* is bound by a decree obtained by a third person against his predecessor

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SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part VIII.—Twelve years.*

ART. 141.

in respect of the idol's property. (Prosunno Koomari *v.* Golab Chand, 23 W. R., 253, P. C.) As to succeeding *mutwoullees*, see 17 W. R., 430.

Where a grant by a Rajah of a *mokurari* lease in lieu of maintenance is, by the custom of the *raj*, liable to revocation at the instance and at the discretion of succeeding Rajahs, each Rajah who, having notice of a claim to hold such *mokurari*, allows twelve years to go by without taking steps to get rid of it, is, at least so far as he is concerned, barred by limitation. (Petamber *v.* Nilmoney, I. L. R., 3 Calc., 793.)

It has been held by the Bombay High Court, that, in respect of *vatans* appendent to hereditary offices, if A. the present incumbent, *alienates* the land, and after A's death, A's successor in office suffers twelve years from that event to elapse without bringing his suit to recover the land, not only he, but his successors also, would be barred by limitation. (Babaji *v.* Nava, I. L. R., 1 Bomb., 535.) As to *adverse possession*, see I. L. R., 9 Bomb., 198. When a permanent tenure has been granted by a *ghatwal*, if the successor of such *ghatwal*, being one of the *ghatwals* to whom Beng. Reg. XXIX of 1814 applies, wishes to resume that tenure, he must bring his suit within twelve years after succeeding to the *ghatwali* estate. (Madho *v.* Tekait, I. L. R., 9 Calc., 411.)

Estates in remainder or reversion are estates in *expectancy* as opposed to estates in *possession*. The estate of the remainderman or the reversioner *falls into possession* on the determination of the particular estate which precedes it.

According to the English law, a reversioner, on a particular estate for years or lives, has the ordinary period within which he may pursue his remedy *after* his reversion falls *naturally* into possession, independently of any right which he may previously have acquired (but has not exercised) to the same by reason of any forfeiture. No one is obliged to take advantage of a forfeiture. This is old law, and is *expressly preserved* by sec. 4 of 3 and 4 Will. IV, c. 27. (Banning, pp. 100, 102, 147.)

Article 140 does not apply to a suit by a *landlord* as such. See p. 158.

When limitation has once *begun* to run against the owner in fee, he cannot, by putting the estate into settlement, give new claims to persons taking remainders, &c., under such settlement. (See Banning, 111; and p. 163, *supra*.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 141.—Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female. | Twelve years ... | When the female dies. |

No. 141. (No 142, Act IX.) See notes to arts. 125 and 140.

When a Hindu widow becomes a *byragini*, she is *civilly* dead. When a Hindu widow *remarries*, all her rights in her husband's property cease and determine as if she is dead. (Act XV of 1856, sec. 2.) *Remarriage* is *expressly* referred to in art. 125, but not in this article. As to the *onus* of proving the *death*, see p. 130, *supra*. As to adverse possession in reference to the widow's estate, see pp. 165, 166 *supra*.

The rule that adverse possession which bars the widow bars the reversionary heir (9 W. R., 505, F. B.; 15 B. L. R., P. C., 10) is no

longer the law in cases falling under art. 141. (Chundernath *v.* Asaram, 1 Shome, 167; Srinath *v.* Prosunno, I. L. R., 9 Calc., 934, F. B.) The case of Saroda *v.* Doyamoyee, I. L. R., 5 Calc., 938, which put a restricted interpretation on the words of this article, though approved of by Kindersley, J. (I. L. R., 4 Mad., 124, 129), has been overruled. (I. L. R., 9 Calc., 934, F. B.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 142.—For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession. | Twelve years ... | The date of the dispossession or discontinuance. |

No. 142. (No. 143, Act IX.) As to what is possession, see pp. 133—141, *supra*.

As to what amounts to dispossession or discontinuance of possession, see pp. 142, 143, *supra*.

The word 'adverse' occurs only in arts. 124 and 144, and does not occur in this or in any other article. In Gobinlall *v.* Debendro Nath Mullick, I. L. R., 5 Calc., 679, Wilson, J., was of opinion, that the framers of the Act were minded to get rid of the distinction between adverse and non-adverse possession wherever it could be done, and wherever any *other* test could be found. With reference to art. 142, the learned Judge held, that where there had been possession followed by a discontinuance of possession, time ran from the moment of its discontinuance, *whether there had or had not been any adverse possession*, and without regard to the intention with which, or the circumstances under which, possession had been discontinued. And it was suggested that, when a friend, relative or other person was *permitted* to enter into possession, the true owner could protect himself only by establishing the relation of *landlord and tenant* between himself and the person so put in possession, or by insisting on periodic written *acknowledgments* of his title. But the permissive occupation or detention, in such cases, is legally no possession at all (see p. 136, *supra*); and the owner cannot, strictly, be said to be 'dispossessed' or to have 'discontinued his possession.' It was accordingly held, on appeal in the same case, that where the owner, in the exercise of his proprietary right, *permits* some other person to occupy his land, or to receive his rents, then (whether the relation of landlord and tenant exists between the parties or not) the *possession* of the owner is *not discontinued*, because, under such circumstances, the possession of the occupier is the possession of the owner. (*Per* Garth, C. J., I. L. R., 6 Calc., 311, 315.) A suit by the true owner for the recovery of immoveable property, in such cases, is not governed by art. 142. If the permissive occupant proves that the character of his possession has *subsequently* become *adverse* to the owner (12 W. R., 250, and p. 151, *supra*), and that he has been in *adverse* possession for twelve years, the suit will be barred by art. 144. (See I. L. R., 6 Calc., 311.)

In suits under art. 142 for possession, as upon a dispossession or discontinuance of possession, the *onus* is on the plaintiff to prove that he, or the person under whom he claims, was in possession within twelve years of the institution of the suit. (See pp. 114—129, *supra*; and

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ARTS. 143, 144.

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I. L. R., 9 Calc., 125; I. L. R., 9 Calc., 744. F. B.; and I. L. R., 10 Calc., 374.) As to how far this rule is modified in cases where the land is shown to have been in a condition *unfitting* it for actual enjoyment in the *usual* modes, see I. L. R., 9 Calc., 744, F. B.; and pp. 119—129, *supra*.

Suits for recovery of possession by an occupancy *raiyat* under the Bengal Tenancy Act, 1885, are *specially* provided for by that Act. Act VIII of 1869, B. C., as well as Act X of 1859 made *special* provisions for such suits by tenants. (See 7 W. R., 186, F. B.; I. L. R., 4 Calc., 527; 5 Calc., 317; 8 Calc., 365; 9 Calc., 280, 423.)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 143.—Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition. | Twelve years ... | When the forfeiture is incurred or the condition is broken. |

No. 143. (No. 144, Act IX.) Cf. Act VIII of 1885, Sched. III, No. 1.

The operation of this article has been considered in Sadha *v.* Musst. Bhagwani, 7 N. W. P., 53, and in Bibi Sahodra *v.* Rai Jang Bahadur, I. L. R., 8 Calc., 224, P. C. In the latter case it was held, that *no condition* attached to the life-estate in question, and that there was no forfeiture of it; but it appears to have been *assumed* that if there had been a forfeiture, a suit by the reversioner for possession might have been barred under this article, although it was brought within twelve years of the time when the reversion *naturally* fell into possession. In the former case it was held, that although the defendant, a usufructuary mortgagee for the term of twenty years, had incurred a forfeiture of his rights by reason of his failure, in the very first year, to pay the mortgagor the annuity stipulated for in the deed of mortgage, each successive failure of payment gave the mortgagor a new right to eject the mortgagee; and that the suit was within time under the provisions of sec. 23, Act IX. (The provisions of sec. 23, Act XV, are in this respect different from the provisions of Act IX.) Article 143 does *not* say that the plaintiff may not waive a forfeiture. (See notes to art. 140.) But if no new arrangement has been come to between the parties, and the suit is brought to enforce the forfeiture under the terms of the *original* grant, &c., the suit, it is apprehended, must be brought within twelve years of the time when the forfeiture was first incurred. See notes to art. 75.

| | | |
|---|---|---|
| 144.—For possession of immoveable property or any interest therein not hereby otherwise specially provided for. | Twelve years ... | When the possession of the defendant becomes adverse to the plaintiff. |

No. 144. (No. 145, Act IX; sec. 1, cl. 12. Act XIV.)

A "suit for possession" is not necessarily a suit for *physical* possession. An *interest* in immoveable property does not, in many cases, admit of physical possession. Possession by receipt of rent is, of course, *possession* within the meaning of this article.

It has been held that a suit to recover a right to an *easement* is a suit to recover an *interest* in immoveable property, and (when acquired

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otherwise than under sec. 26, Act XV) is governed by the twelve years' rule. (Kurupam *v.* Merangi, I. L. R., 5 Mad., 253. See also 24 W. R., 300.)

A suit by a person admittedly in possession as a *tenant*, for a declaration of his right to possession as *proprietor*, is a suit for (proprietary) possession. (I. L. R., 3 All., 40.) See the notes to art. 120, as to whether all *declaratory* suits in respect of immoveable property are governed by art. 144.

The words "not hereby otherwise specially provided for" refer to suits for possession of *immoveable* property, and not to suits *generally*. (See 25 W. R., 521, 523, and the notes to art. 113.)

A suit by the mortgagee, for possession of the mortgaged property, against a person who subsequently purchased the property, *bonâ fide*, as an absolute property, from the mortgagor, will probably fall within this article. (See the notes to arts. 134 and 135.) So a suit by a landlord against a person who purchased the land from his tenant is governed by this article. (Compare art. 139.) A suit against a person who purchased the plaintiff's immoveable property, *bonâ fide* and for a valuable consideration, from a person who is guilty of concealed fraud under sec. 18, is also "not specially provided for." (See notes to sec. 18.) Suits against trespassers on property mortgaged or leased will apparently fall within art. 144. (See W. R., Gap No., p. 375; I. L. R., 9 Calc., 367.) As to *adverse possession* in these cases, see pp. 154—165, *supra*.

A suit to recover possession of land from a party who had been originally put into possession of it by the owner as a *permissive* occupant is governed by this article. (See I. L. R., 6 Calc., 311.)

A suit by a mortgagee to enforce his mortgage lien against the mortgaged property is governed by this article, if the defendant has been in possession of it adversely to the mortgagor and the mortgagee. (I. L. R., 5 All., 1, P. C.)

A suit to recover possession of mortgaged property, as *absolute* owner after foreclosure, is governed by this article. (I. L. R., 10 Calc., 68.)

Where lands have been partitioned by a private arrangement between two co-sharers, A and B, if the arrangement by which *distinct* plots are held by A and B in severalty is afterwards set aside at the instance of an execution-purchaser of the rights and interests of A in the whole of the lands, and such purchaser takes possession of A's undivided share of the *whole*, B's suit for his share of the *specific* plots which had been allotted to A by such arrangement, is governed by this article. (Dewan Manwar Ali *v.* Annoda Persad, I. L. R., 5 Calc., 644, P. C.) See pp. 129-130, *supra*.

"When the possession of the *defendant* becomes *adverse* to the plaintiff."—The possession of any person *from or through* whom a defendant derives his liability to be sued is also the possession of the *defendant*. (*Vide* sec. 3.) Possession properly taken by Government for the enforcement of a revenue demand is not adverse to the true owner, even although payments of surplus-proceeds are made to the defendant. Such possession is like the possession of a stakeholder who holds the property for the real owner, whoever he may be. The defendant, in such a case, is not entitled to add to the period during which he has himself been in possession, the period during which the Government was in such possession: 1*st*, because the possession of Government was *not adverse* to the plaintiff; and 2*ndly*, because the defendant does *not derive* his liability to be sued from or through the Government. (Karan Singh *v.* Bakar Ali, I. L. R., 5 All., 1. P. C. This case is referred to and explained in I. L. R., 10 Calc., 374, 378; and I. L. R., 10 Calc., 697, 708.)

Where, in consequence of dissensions in the family of the real owners, Government attaches their lands and holds the same as their guardian

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*Part VIII.—Twelve years.*

or bailiff, and does not restore the lands to the real owners, until sixty or seventy years after the date of attachment, a suit by the real owners against a person who entered into possession as a tenant of the Government, is not barred by limitation if brought within twelve years from the date of the restoration. The plaintiffs would be excused by all legal principles from having taken any legal steps in the meantime, not only on the ground of their individual rights being in suspense—in *custodia legis* in a particular sense—but because they *could not act or sue*—the inability of the plaintiffs to bring their suit earlier falling within the purview of the maxim *contra non valentam agere non currit præscriptio*. (Tukaram *v.* Sujangir, I. L. R., 8 Bomb., 585.)

As to what constitutes *adverse* possession, see *supra*, pp. 144, *et seq.*

In the case of a sale out and out, if the vendor remain in possession, his possession is *adverse* to the purchaser from the date of the *execution* of the conveyance. The commencement of the adverse possession is *not* deferred until the *registration* of the document. (Anandcoomari *v.* Ali Jamin, I. L. R., 11 Calc., 229.)

The periods of possession of successive and independent trespassers cannot be added to make up the twelve years required by *this article*. The last of the trespassers, against whom the suit is brought, does *not derive* his liability to be sued from or through any of the preceding trespassers. (See pp. 170, 171, 337, *supra*.)

In a suit falling within art. 144 (and *not* under art. 142, for possession *as upon a dispossession*), it is not necessary for the plaintiff to prove that he was in *possession* within the period of twelve years. (I. L. R., 5 All., 1. P. C.; I. L. R., 10 Calc., 374, 379.) If the plaintiff's suit is not *primâ facie* barred by limitation (see p. 111, *supra*), it lies on the defendant to prove an adverse possession for twelve years in order to establish his defence under this article. (See I. L. R., 10 Calc., 374, 379.) As to the question of *onus* in cases under art. 144, see pp. 129, 130, *supra*.

*Part IX.—Thirty years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 145.—Against a depositary or pawnee to recover moveable property deposited or pawned. | Thirty years ... | The date of the deposit or pawn. |

No. 145. (No. 147, Act IX; sec. 1, cl. 15, Act XIV.)

Before 1862, suits against depositaries or mortgagees for recovery of property deposited or mortgaged, were not barred by any limitation. (See, pp. 51, 52, *supra*, and p. 632, *infra*.)

As to *acknowledgments* of the title of the depositor or pawner or of his right of redemption, see sec. 19, and pp. 273, 274, and 277, *supra*.

A *depositary* is a person holding possession of moveable property originally delivered to him to be kept for the owner. A *pawnee* is a person to whom such property is delivered in pledge as security for a debt.

Suits for *money* deposited under an agreement that it shall be payable on demand are governed by art. 60. Article 145 applies to deposits recoverable *in specie*. (16 W. R., 164 (note); 25 W. R., 415.) The balance of monies paid to the Collector, to meet uncertain sums due for Government revenue, subject to an adjustment when the share of the revenue for which the plaintiff is responsible shall be ascertained, is not a deposit, and the Collector in such a case is not a depositary. (Gobind *v.* Collector, 11 W. R., 491.)

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*Part IX.—Thirty years.*

A suit against a person other than the depositary or pawnee is not governed by this article. A suit against a person who has bought the property from the depositary or pawnee is governed by art. 133.

Time runs from the date of the deposit or pawn, not from the date when the property is to be returned or the debt to be paid. (See. p. 258, *supra.*)

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 146.—Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged. | Thirty years ... | When any part of the principal or interest was last paid on account of the mortgage-debt. |

No. 146. (No. 149. Act IX; sec. 6, Act XIV.)

See the notes to art. 135 which provides for similar suits in the Mofussil. The suit under this article must be brought against the original *mortgagor* or some other person who claims the right of redemption. Art. 135 does not *expressly* state *against whom* the suit under that article must be brought.

Under Act XIV, the period of limitation was 12 years; under Act IX, it was 60 years, under this Act it is 30 years. The provisions of this article are explained in 16 W. R., P. C., 33, and I. L. R., 4 Calc., 283. See p. 323, note 9, *supra.*

The 12 years' limitation will apply where there has been *no* payment on account of the mortgage-debt. (Ramchunder *v.* Juggutmonmohinee, I. L. R., 4 Calc., 283.)

This article does not apply when the defendant is a person *other* than the mortgagor. A person who represents the mortgagor and merely claims the equity of redemption is, of course, bound by this article. In England under 7 Will. and 1 Vict., C. 28, even where a *third* party is in possession, payment of interest by the mortgagor saves the mortgagee's suit for possession. (See. p. 163, *supra.*)

*Part X.—Sixty years.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 147.—By a mortgagee for foreclosure or sale. | Sixty years ... | When the money secured by the mortgage becomes due. |

No. 147.

Before the Transfer of Property Act, 1882, the mortgagee, under the Bengal Regulations, had to *apply* to the District Judge to issue a notice of foreclosure on the mortgagor or his representatives, and if the mortgage-debt was not paid off within a year of the service of such notice, the mortgage was foreclosed. There was no limitation applicable to such an *application.* (22 W. R. p. 94.)

A *suit* to foreclose an English mortgage or an equitable mortgage, in a court established by Royal Charter, was under Act XIV of 1859 governed by sec. 1, cl. 12. (See I. L. R., 3 Bomb., 312, 331.) Under

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*Part X.—Sixty years.*

ART. 148. Act IX, such a suit might be treated as a suit for the enforcement of a charge under art. 132 or as a suit for possession of mortgaged property under art. 149. (Ganput *v.* Adarji, I. L. R., 3 Bomb., 312, 331.)

According to the Calcutta High Court, the 12 years' rule applied to a suit for foreclosure under Act XIV and Act IX. (Ramchunder *v.* Juggutmonmohinee, I. L. R , 4 Calc,. 283, 302, 303.)

As the right to foreclose is, in the absence of any stipulation, co-extensive with the right to redeem. the *same* period of limitation should be prescribed for suits for foreclosure and suits for redemption. Act XV expressly allows 60 years in both cases.

As to whether a suit by a simple mortgagee to enforce the payment of the mortgage-money by a sale of the mortgaged property is governed by this article or by art. 132, see I. L. R., 6 All., 551, F. B., and the notes to art. 132. As to what mortgagees are entitled to sue for foreclosure or sale, see notes to art. 132. If the mortgaged property is in the possession of a person who claims to hold the property as his absolute property, *adversely* to the mortgagor and mortgagee, the mortgagee's suit will be governed by art. 144. (See. 16 W. R.. P. C., 19 ; I. L. R., 2 Mad., 226.) A suit against such a person is not a suit for *foreclosure* of the mortgage, but a suit for possession of the property. (Compare Manly *v.* Patterson, I. L. R., 7 Calc., 394.) As to the effect of a foreclosure, see p. 621.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 148.—Against a mortgagee to redeem or to recover possession of immoveable property mortgaged. | Sixty years ... | When the right to redeem or to recover possession accrues.<br>Provided that all claims to redeem, arising under instruments of mortgage of immoveable property situate in British Burmah, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day. |

No. 148. (No. 148. Act IX ; sec. 1, cl. 15, Act XIV.)

See notes to art. 145.

Before the enactment of cl. 15, sec. 1, Act XIV of 1859, there was no limitation to suits for the redemption of mortgages. (See Daia *v.* Sarfraz, I. L. R., 1 All., 425, 427.) But if a *bonâ fide possessor* held the property for the prescribed period, the mortgagor could not recover the property from *him*. (See pp. 52 and 57, *supra*.)

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

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ART. 149.

*Part X.—Sixty years.*

For suits against a mortgagee of immoveable property for the recovery of the same, Act XIV of 1859 prescribed a limitation of 60 years from the time of mortgage. A suit even against a *usufructuary* mortgagee was barred after 60 years from the date of the mortgage. (See p. 189, *supra.*) A suit by a *simple* mortgagor to *redeem* the mortgage was not governed by this provision.

Act IX of 1871 re-enacted the same rule in very nearly the same words with a proviso in favor of certain mortgages in British Burmah. Act XV of 1877 speaks of suits for *redemption* as well as of suits to *recover* possession of immoveable property mortgaged. And the period of 60 years, under this Act, runs, *not* from the *date* of the mortgage, but from the time when the right to redeem or to recover possession accrues. As to when this right accrues, see secs. 60 and 62 of the Transfer of Property Act. Even where the mortgage-money is "repayable *within* 10 years," the right to foreclose, and consequently the right to redeem, does not accrue until after the *expiry* of 10 years. (Vadjee *v.* Vadjee, I. L. R., 5 Bomb., 22.) A written acknowledgment of the right of the mortgagor gives a fresh start under sec. 19. (See pp. 273-277, *supra.*)

This article applies so long as the relation of the parties is not changed by foreclosure. If the right of redemption is extinguished by foreclosure, the mortgagor's suit is *not* a suit for *redemption* or for recovery of property *mortgaged.* (See Lotf Hossein *v.* Abdool Ali, 8 W. R., 476; *Bromhomoyi* v. *Jugobundhoo*, 7 C. L. R., 583, 589.) The same remarks might apply to cases where the mortgage-debt has been *paid off* by the usufruct or otherwise. But see Baboo Lall *v.* Jamal (9 W. R., 187, F. B.)

The mere assertion of an *adverse* title by a *mortgagee* in possession does not enable him to abbreviate the period of 60 years. (I. L. R., 1 All., 655.)

Art. 148 applies to suits against a *mortgagee* or against persons *claiming under* the mortgagee, except purchasers for value (art. 134), but it does not apply to suits against *strangers*, nor to suits which are not suits for redemption or for recovery of property mortgaged. (Ammu *v.* Ramkrishna, I. L. R., 2 Mad., 226. But see 12 Bomb., 180.) If the owner of the right of redemption of *part* of an estate under mortgage pays the *whole* debt and redeems the *whole* mortgage, he thereby puts himself in the place of the *mortgagee* and holds the *other* parts of the estate as a security for the surplus payment he may have been obliged to make. (Asansab *v.* Vamana, I. L. R., 2 Mad., 223.) A suit by the *other owners* of the equity of redemption for recovery of their shares of the property will, in this view, be governed by the 60 years' rule under art. 148. (See p. 162 note, *supra.*) The possession of the redeeming mortgagor is not adverse to his co-mortgagors until the date of redemption, and the latter will have, *at least*, 12 years to recover their shares under art. 144. (See I. L. R., 3 All., 24, F. B.; I. L. R., 7 Mad., 26.)

As to when possession becomes adverse in cases of mortgage, see pp. 160-164, *supra*, and notes to arts. 135, 144, 146, and 147.

As to whether the right to officiate as priest at the funeral ceremonies of Hindus in a particular mouza is *immoveable* property within the meaning of this article, see 13 C. L. R., 263, and pp. 177, 202 (notes), *supra.*

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 149.—Any suit by or on behalf of the Secretary of State for India in Council. | Sixty years ... | When the period of limitation would begin to run under this Act against a like suit by a private person. |

ACT XV OF 1877.

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part X.—Sixty years.*

ART. 149.

No. 149. (No. 150, Act IX; sec. 17, Act XIV.)

As to the old law on the subject, see pp. 51, 64, and 69, *supra*. Beng. Reg. II of 1805 allowed 60 years to suits *by or on behalf of Government* for any *public* rights or claims whatever, in the mofussil of the Presidency of Bengal. Sec. 17, Act XIV of 1859, left the law on this subject unaffected by its provisions. Reg. II of 1805 was repealed by Act VIII of 1868. (See the note to sec. 17, Act XIV of 1859.) Act IX of 1871 prescribed 60 years' limitation to suits *in the name* of the Secretary of State for India in Council. Act XV of 1877 prescribes the same period for suits *by or on behalf* of the Secretary of State for India in Council.

Under Beng. Reg. II of 1805 it was necessary to consider whether the suit was in respect of a *public* right. The recovery of costs incurred by Government in the character of agents was not a *public* right. (Government *v.* Shurrafoonnissa, 3 W. R., P. C., 31.) Under Reg. II of 1805, sixty years was fixed as the *absolute* limit beyond which neither fraud nor any other special allegation gave the Government a cause of action. (Bromanund *v.* The Government, 5 W. R., 136.) It is otherwise under Acts IX and XV.

As to actions and contracts by the Secretary of State, see secs. 65, 68 of 21 and 22 Vict., chap. 106.

Applications for execution of decrees by or on behalf of Government are, it has been held, governed by the ordinary rule applicable to private suitors. (See Construction No. 1348; Cal. Sud. Dew. Rep. for 1854, p. 426; The Collector *v.* Sheehury, 22 W. R., 512; Appaya *v.* The Collector, I. L. R., 4 Mad., 155.) It is true that in Shamee Mahomed *v.* Moonshee Mahomed (11 W. R., 67), Norman and Jackson, JJ., held, that the right of Government to the value of the stamp duty which had been remitted in respect of a *pauper* suit was a public right within the meaning of Reg. II of 1805, and that the Crown not having been named in sec. 20, Act XIV of 1859, was not barred by the 3 years' limitation provided for in that section. But under Act IX of 1871, it was held, that, as regards the question of limitation, so far as *appeals* and *applications* were concerned, the Legislature made *no* difference between Government and its subjects. (Venubai *v.* The Collector, I. L. R., 7 Bomb., 552, note.)

It has not yet been finally decided by all the High Courts that the maxim *Nullum tempus occurrit regi* (no time affects the Crown) applies to this country. The maxim could hardly have applied to the East India Company, and so far as the Secretary of State in Council, under 21 and 22 Vict., c. 107, stands in the place of the old Company, it may be doubted if the maxim applies even to him. (See I. L. R., 4 Mad., 155; I. L. R., 7 Bomb., 542, 545. Cf. pp. 199 and 431, *supra*.)

But as Act XV contains express provisions prescribing limitation to the Government for the institution of suits (art. 149) and the presentation of criminal appeals (art. 157), it may be *inferred* that the Legislature contemplated that the Crown should enjoy a privilege to the extent expressed and no further—*expressum facit cessare tacitum*. (Appaya *v.* The Collector, I. L. R., 4 Mad., 155.) It may be observed, however, that the *third division* of the second schedule of Act XV, which relates to *applications*, does *not* make *any* express provision as regards applications by *Government*. (See pp. 431 and 432, *supra*, as to the effect of naming the Crown in one part of a statute and not naming it in another.)

Where the Mahomedan Government had made an endowment for pious and beneficial purposes, and the plaintiff, upon his appointment as *mutwallee* or superintendent of the endowment, sued to recover possession of property belonging to the endowment, it was held that, under

SECOND SCHEDULE—FIRST DIVISION: SUITS—(*contd.*)

*Part X.—Sixty years.*

Beng. Reg. XIX of 1810, the *mutwallee* was the *agent of Government* for performing its duty of protecting the endowment from misapplication, and that the suit fell within the 60 years' rule under Reg. II of 1805. (Jewan Dass *v.* Shah Kubeerooddin, 6 W. R., P. C., 3.) As the Government has now divested itself of the management of religious endowments and as the provisions of Reg. XIX of 1810 have been modified, the *ordinary* rules of limitation are now applicable to suits by *mutwallees*. (Shaik Laul *v.* Lalla Brij, 17 W. R., 430.)

Where the Government has no title to intervene in a contest between two private owners, it can not, by improperly making common cause with the plaintiff, extend the period of limitation to sixty years. (Gunga Govind *v.* The Collector, 7 W. R., P. C., 21.) But where a *ghatwallee* mehal was attempted to be converted into a *mal* mehal by the collusion of the zemindar and the former *ghatwal*, the Government, it was held, could *properly* make common cause with a succeeding ghatwal for the recovery of the *ghatwallee* lands. The 60 years' limitation was applied in this case. (Petumber *v.* Juggurnath, 18 W. R., 130, see also 5 W. R., 136.) But compare the remarks of Markby, J., in Erskine *v.* The Government, 8 W. R., 232, 238.)

It has been held that a private person, by the mere fact of his purchasing a *khas mehal* from Government, does not get 60 years within which to bring his suit for recovery of lands belonging to such mehal, and that such a purchaser is bound by the ordinary rule of limitation. (Boondi Roy *v.* Pundit Bunsee, 24 W. R., 64.) Where the plaintiff, as lessee under a Government settlement, claimed certain lands of which the defendant, another lessee of Government, had held possession for more than 12 years, it was held that the plaintiff was not entitled to the extended limitation under Reg. II of 1805. (Assoo *v.* Rajoo, 10 W. R., 76.)

In England, the privilege of the Crown has, in some cases at least, been extended to a grantee or lessee of the Crown. (Doe *v.* Roberts, 13 Mee. and W., 520; Leo *v.* Norris, Cro. Eliz., 331; Banning, 251; Brown, 94.) Where the Crown takes as assignee the rights of a subject, through a forfeiture or otherwise, there is more difficulty in the question. (See Brown, 543; Banning, 252.) In British India, *any* suit brought *by* or *on behalf* of the Secretary of State for India in Council is governed by the 60 years rule. But the Court has to consider whether or not the right of the subject was *barred or extinguished* at the date of the assignment. If the right was not barred or extinguished on that date, art. 149 will give the Secretary of State an extended period.

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SECOND DIVISION: APPEALS.

Secs. 4, 5, 6 and 12 apply to *appeals* as well as to suits and applications.

An *application* for leave to appeal as a pauper (sec. 592, Civil Procedure Code), or an application for the admission of an appeal to Her Majesty in Council (sec. 598, *ibid*), is *not* an *appeal*. Such applications are provided for by arts. 170 and 177. It may be mentioned here that the words "A High Court" include the highest civil court of appeal in any province of British India. The Chief Court of the Punjab and the Court of the Judicial Commissioner of Burmah are High Courts. (See Act 1 of 1868.)

| Description of appeal. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 150.—Under the Code of Criminal Procedure from a sentence of death passed by a Sessions Judge. | Seven days ... | The date of the sentence. |

ACT XV OF 1877.

SECOND SCHEDULE—SECOND DIVISION: APPEALS—(*contd.*)

| | Description of appeal. | Period of limitation. | Time from which period begins to run. |
|---|---|---|---|
| ARTS. 151, 152, 153, 154, & 155. | 151.—From a decree or order of any of the High Courts of Judicature at Fort William, Madras and Bombay * in the exercise of its original jurisdiction. | Twenty days ... | The date of the decree or order. |

As to appeals from original decrees of the Punjab Chief Court, see Act XVII of 1877, secs. 17 and 18.

"The date of the decree."—As the decree is to bear date the day on which the judgment is pronounced, the appeal must be filed within 20 days from the day on which the *judgment* is pronounced. So long as the Legislature does not alter the law, this rule applies even when the decree is not drawn up and signed until after 20 days have expired from the delivery of the judgment. If the party against whom judgment is given applies for a copy of the decree before these 20 days expire, his appeal may be saved by the provisions of sec. 12. (Rainey *v.* Broughton, I. L. R., 10 Calc., 652.)

| | | |
|---|---|---|
| 152.—Under the Code of Civil Procedure, to the Court of a District Judge. | Thirty days ... | The date of the decree or order appealed against. |

Any order made upon an application for a review of judgment (*except* an order *rejecting* the application) becomes, if it in any way modifies or alters the original order (although the modification or alteration extends only to the rectification of a clerical mistake), the final order in the case. The party aggrieved by the original decree is entitled (although the modification or alteration was made in his *favor*) to treat the order upon review of judgment as the final decree or order in the case, and may appeal within thirty days from its date. (Joy Kissen *v.* Atnoor, I. L. R., 6 Calc., 22.) The same rule applies if an application for review of judgment is granted, but on review the original decree is ultimately *upheld*.

| | | |
|---|---|---|
| 153.—Under the same Code, section 601, to a High Court. | Thirty days ... | The date of the order refusing the certificate. |

This appeal is from an order refusing to certify that a final decree passed by a court *other* than a High Court is such that it may be appealed to Her Majesty in Council.

| | | |
|---|---|---|
| 154.—Under the Code of Criminal Procedure, to any court other than a High Court. | Thirty days ... | The date of the sentence or order appealed against. |
| 155.—Under the same Code, to a High Court, except in the cases provided for by No. 150 and No. 157. | Sixty days ... | Ditto. |

* The words "or the Chief Court of the Punjab" are inserted after "Bombay" by Act XVII of 1877, sec. 12.

SECOND SCHEDULE—SECOND DIVISION: APPEALS—(*contd.*)

| Description of appeal. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 156.—Under the Code of Civil Procedure, to a High Court, except in the cases provided for by No. 151 and No. 153. | Ninety days ... | The date of the decree or order appealed against. |

A second appeal to the Judicial Commissioner of British Burmah under secs. 27 and 34 of the Burmah Courts Act was not intended to be governed by this article. (Mahomed *v.* Inodeen, I. L. R., 10 Calc., 946.)

| | | |
|---|---|---|
| 157.—Under the Code of Criminal Procedure, from a judgment of acquittal. | Six months ... | The date of the judgment appealed against. |

For the old law on the subject, see sec. 272, Act X of 1872, sec. 23, Act XI of 1874, and Empress *v.* Jyadulla, I. L. R., 2 Calc., 76.

THIRD DIVISION: APPLICATIONS.

Secs. 7—9, 14. 17—19 of the Act apply to *applications* as well as to suits. Secs. 4, 5, 6 and 12 apply to *applications* as well as to *suits* and *appeals*.

| Description of application | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 158.—Under the Code of Civil Procedure, to set aside an award. | Ten days .. | When the award is submitted to the Court. |

Chap. 37 of the Code of Civil Procedure is referred to here. Under sec. 522 of the Code, if no application is made within the prescribed period to set aside the award of arbitrators (to whom any matter in dispute between the parties to a suit has been referred by the Court), the Court is bound to give judgment according to the award, provided it sees no cause to remit the award for the reconsideration of the arbitrators. As to the computation of the period, see sec. 12, last para.

| | | |
|---|---|---|
| 159.—For leave to appear and defend a suit under Chapter XXXIX of the Code of Civil Procedure. | Ten days ... | When the summons is served. |

Chap. 39 of the Code refers to *summary* procedure on Negotiable Instruments. See sec. 533 of the Code.

| | | |
|---|---|---|
| 160.—For an order under section 629 of the same Code, restoring to the file a rejected application for review. | Fifteen days ... | When the application for review is rejected. |
| 161.—*For the issue of a notice under section 258 of the same Code, to show cause why the payment or adjustment therein mentioned should not be recorded as certified. | Twenty days ... | When the payment or adjustment is made. |

* Originally this stood as follows: "For an order under section 258 of the same Code compelling a decree-holder to certify payment or adjustment." The amendment was made by Act XII of 1879.

ACT XV OF 1877.

ARTS. 162—65.

SECOND SCHEDULE—THIRD DIVISION: APPLICATIONS—(*contd.*)

The payment out of court of money payable under a decree, or the adjustment of a decree in whole or in part, is required to be certified by the decree-holder to the court whose duty it is to execute the decree. If, on the application of the judgment-debtor, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court records the same.

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 162.—For a review of judgment by any of the High Courts of Judicature at Fort William, Madras and Bombay* in the exercise of its original jurisdiction. | Twenty days ... | The date of the decree or order. |

See sec. 623 of the Civil Procedure Code. Compare No. 173, which applies to applications for reviews of judgments of the Mofussil Courts and of the High Court in the exercise of its appellate jurisdiction.

Arts. 162—164, arts. 166—170, arts. 172 and 173, arts. 175, 177 and 180 do not *in terms* refer to the Code of Civil Procedure.

| | | |
|---|---|---|
| 163.—By a plaintiff, for an order to set aside a dismissal by default. | Thirty days ... | The date of the dismissal. |

See sec. 103 of the Civil Procedure Code, and compare art. 168.

| | | |
|---|---|---|
| 164.—By a defendant, for an order to set aside a judgment *ex parte*. | Thirty days ... | The date of executing any process for enforcing the judgment. |

See sec. 108 of the Civil Procedure Code, and compare art. 169. Under this article, time does not begin to run until sometime *after* the accrual of the right to apply. The defendant has a right to apply to set aside an *ex parte* judgment, even though *no* attempt has been made to *enforce* the judgment.

A notice to show cause why the decree should not be executed, under sec. 248 of the Procedure Code, is not a "process for enforcing the judgment." A legal process of attachment or arrest must be formally executed before time begins to run against the applicant. (Poorno *v.* Prossuno, I. L. R., 2 Calc., 123.) The Court may *presume* that the process of attachment was *regularly* executed. The date of executing the *first* process sets time running against the applicant, even if he is not aware of it. (Bhoobunessury *v.* Jadobendro, I. L. R., 9 Calc., 869.) The service of a precept or injunction on the defendant in pursuance of the judgment or order may be sufficient. (Sunraj *v.* Ambika, I. L. R., 6 All., 144.)

| | | |
|---|---|---|
| 165.—Under the Code of Civil Procedure, by a person dispossessed of immoveable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession. | Thirty days ... | The date of the dispossession. |

* The words "or the Chief Court of the Punjab" are inserted after "Bombay" by Act XVII of 1877, sec. 18.

SECOND SCHEDULE THIRD DIVISION: APPLICATIONS—(*contd.*) ACT XV OF 1877. ARTS. 166, 67.

The application of the *decree-holder* or the *execution-purchaser* who is resisted or obstructed, is governed by secs. 328, 334, and 335 of the Civil Procedure Code, and art. 167 of this Act.

After delivery of *formal* possession by the Court, the decree-holder or auction-purchaser *may*, if necessary, bring a *regular* suit for possession against the *judgment-debtor*. (See Shama Churn *v.* Madhub, I. L. R., 11 Calc., 93.)

Under this article, the application is *against* the decree-holder or the purchaser. See secs. 332 and 335 of the Civil Procedure Code. An order passed on an application under this article may be questioned in a *regular suit* to establish the right of the party against whom the order is given. Where the suit has reference to an order under sec. 335 of the Procedure Code, art 11 applies. Where, however, the suit has reference to an order under sec. 332 of the Code, the *ordinary* rule of limitation applies. (Ayyasami *v.* Sawiya, I. L. R., 8 Mad., 82.)

If *no* application is made under sec. 332 or sec. 335, the party dispossessed has the ordinary period of twelve years to bring his *suit*. (See Protab *v.* Brojolall, 7 W. R., 253, F. B.; Kishen Sunder *v.* Fukeerooddeen, W. R., Gap No., p. 61.)

Art. 165 refers mainly, if not entirely, to applications by *third* parties. But in Mahomed *v.* Kokil (I. L. R., 7 Calc., 91), this article was considered to be applicable to applications by the *judgment-debtor*.

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 166.—To set aside a sale in execution of a decree, on the ground of irregularity in publishing or conducting the sale, *or on the ground that the decree-holder has purchased without the permission of the Court.** | Thirty days ... | The date of the sale. |

See secs. 294 and 311, Civil Procedure Code.

| | | |
|---|---|---|
| 167.—Complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree, or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property. | Thirty days ... | The date of the resistance, obstruction or dispossession. |

See secs. 328, 334, and 335 of Civ. Pro. Code, and notes to art. 165.

The *first* portion of art. 167 refers to applications *by* the decree-holder or the execution-purchaser. Arts. 165 & 167 partially overlap each other.

Sec. 328 of the Civil Procedure Code, which was passed *after* Act XV of 1877 came into operation, enacts that the *decree-holder* may, in case of obstruction, complain to the Court at any time within *one month*. Sec. 334 extends the provisions of sec. 328 to cases where the *judgment-*

* The words in italics have been added by Act XII of 1879.

*debtor* obstructs the *execution-purchaser* in obtaining possession of immoveable property.

ARTS. 168—71.

It is *not compulsory* on the decree-holder or the purchaser at an execution-sale to make an application under sec. 328 of the Civil Procedure Code. (Balwant *v.* Babaji, I. L. R., 8 Bomb., 602.) He may bring a regular suit instead of making an application under the section. (*Ibid*, see also Shoteenath *v.* Obhoy, I. L. R., 5 Calc., 331.)

"The date of resistance or obstruction."—This is *not* necessarily the date of the *first* resistance or obstruction. Where a fresh warrant for possession was applied for and granted, and the person who resisted the execution of the first warrant renewed his resistance to the second, it was held that a complaint by the decree-holder made within thirty days from the date of the second obstruction was within time. (Ramasekara *v.* Dharmaraza, I. L. R., 5 Mad., 113.)

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 168.—For re-admission of an appeal dismissed for want of prosecution. | Thirty days ... | The date of the dismissal. |

See sec. 558 of the Civil Procedure Code. Time runs from the date of *dismissal*, irrespective of any consideration other than one of those which come under some of the Exceptions applicable to the case.

| | | |
|---|---|---|
| 169.—For a re-hearing of an appeal heard *ex parte* in the absence of the respondent. | Thirty days ... | The date of the decree in appeal. |

See sec. 560 of the Civil Procedure Code.

| | | |
|---|---|---|
| 170.—For leave to appeal as a pauper. | Thirty days ... | The date of the decree appealed against. |

See sec. 592 of the Civil Procedure Code.

The time for applying for leave to appeal as a pauper is thirty days, even if the application has to be made to the High Court. Under art. 162 of Act IX of 1871, the period allowed was ninety days, whether the application was made to the District Court or to the High Court.

| | | |
|---|---|---|
| 171.—Under section 363 or 365 of the Code of Civil Procedure, by a person claiming to be the legal representative of a deceased plaintiff or *appellant*.* | Sixty days ... | The date of the plaintiff's *or appellant's** death. |

Arts. 171, 171A, 171B, & 171C refer to *certain* applications under chap. 21 (as amplified by sec. 582) of the Civil Procedure Code. Art. 171 refers to an application made *by* the legal *representative* of a deceased *plaintiff* to *get himself substituted* in the place of the deceased on the record.

* The words in italics have been added by Act XII of 1879.

Art. 171A deals with an application *by* the *defendant* to *bring* in the legal *representative* of the deceased *plaintiff*, supposing no application has been made by such representative under the preceding article.

Art. 171B refers to an application *by* the *plaintiff* to substitute the legal *representative* of a deceased *defendant* in the place of the deceased on the record.

Art. 171C applies to an application *by the legal representative* of the deceased (or insolvent) *plaintiff* to set aside an order for abatement under sec. 366 (or an order of dismissal under sec. 370) of the Procedure Code.

An application by the representative of a *defendant* or *respondent* to get *himself* substituted or added as a party to the suit or appeal is not governed by any of these four articles. An application under sec. 372 of the Civil Procedure Code is governed by art. 178. (Benode *v.* Sharat, I. L. R., 8 Calc., 837, 844.) As to what applications for the substitution or addition of parties sec. 372 applies, see Gocool *v.* Administrator-General, I. L. R., 5 Calc., 726, 731; Rajaram *v.* Jibai, I. L. R., 9 Bomb., 151; and I. L. R., 8 Calc., 837.

The words "or appellant" in art. 171, and arts. 171A, 171B, and 171C, were added by Act XII of 1879. As to the state of the law at the time of this enactment, see 3 C. L. R., 440; 4 C. L. R., 374; I. L. R., 6 Bomb., 26; I. L. R., 5 Calc., 139, and p. 185, *supra*.

Sec. 582 of Act XIV of 1882 enacts that the words 'plaintiff,' 'defendant' and 'suit' in secs. 363, 365, 366, 368, 371 and other sections of chap. 21 of the Code, shall be held to include an *appellant*, a *respondent*, and an *appeal* respectively.

The *express* mention of "plaintiff *or appellant*" in art. 171 *does not necessarily* lead to the conclusion that the word 'defendant' in the next two articles does *not*, since June 1882, include a *respondent*. The principle of *expressum facit cessare tacitum* is not universal and sufficient. (*Per* West, J., in Prabhoker *v.* Vishwambhar, I. L. R., 8 Bomb., 313, 318.)

In case of the death of a *respondent*, the rule of limitation in art. 171B has been applied to the *appellant's* application under sec. 368 of the Code. (See Suri *v.* Sitaram, I. L. R., 7 Mad., 195.)

Secs. 363 and 365 and art. 171 do not apply to cases where the original plaintiff or appellant dies after the determination of the suit or appeal. (See I. L. R., 3 Mad., 236, and 5 C. L. R., 108.) When the plaintiff dies after the suit has been decided by the first Court, his legal representative may (with the permission of the Appellate Court) prefer an appeal within the usual period. (Ramananda *v.* Minachi, I. L. R., 3 Mad., 236; Moharanee *v.* Lochman, 2 Sev., 892.)

An application by the legal representative of a deceased *decree-holder* to continue execution-proceedings, is not governed by this article. (Gulabdass *v.* Lokshawan, I. L. R., 3 Bomb., 221; Dulari *v.* Mohun Sing, I. L. R., 3 All., 759, 764.)

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| * 171A.—Under section 366 of the same Code, by the defendant. | Sixty days ... | † *The sixtieth day from* the date of the plaintiff's death. |

See notes to art. 171. An application by *the respondent* for bringing in the legal representative of the deceased appellant is (by sec. 582 of the

* Nos. 171A, 171B & 171C have been inserted by Act XII of 1879.

† The words in italics were, by a clerical error, omitted from Act XII of 1879. The error has been corrected by Act VIII of 1880.

ACT XV OF 1877. — ARTS. 171B–172.

SECOND SCHEDULE—THIRD DIVISION: APPLICATIONS—(*contd.*)

Civil Procedure Code) "an application under sec. 366 of the same Code by the *defendant*." (See I. L. R., 7 Mad., 195.)

If the defendant (or respondent) does apply, he must, under this article, do so within 60 days from the *expiration* of the time ordinarily allowed by art. 171 to the legal representative of the deceased *plaintiff* (or appellant.)

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| * 171B.—Under section 368 of the same Code, to have the representative of a deceased defendant made a defendant. | Sixty days | ... The date of the defendant's death. |

See the notes to art. 171. This article, it has been held, does not apply to an application by the plaintiff to enter the name of the representative of the defendant in the register of the suit in the place of that of the defendant who had died *after* a decree for partition had been obtained, but before the usual commission for partition was issued. (Kedar Nath *v.* Harra Chand, I. L. R., 8 Calc., 420.)

This article does not apply where the original defendant, named by the plaintiff in his application to sue as a *pauper*, dies *before* such application is registered as a *suit*. (Janardan *v.* Anant, I. L. R., 7 Bomb., 373.)

If, on the death of the defendant (or respondent), no application is made by the plaintiff (or appellant) within the period allowed by this article, the suit (or appeal) abates, *unless he satisfies the Court that he had sufficient cause for not making the application within such period*. (See sec. 368, Act XIV of 1882.)

Where in such a case the Court has already passed an order for abatement under sec. 368, such order cannot be set aside under sec. 371. Sec. 371 applies to abatement consequent on the death of the *plaintiff* (or appellant). (See I. L. R., 7 Mad., 195, and I. L. R., 8 Calc., 837.)

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| * 171C.—Under section 371 of the same Code, for an order to set aside an order for abatement or dismissal. | Sixty days | ... The date of the order for abatement or dismissal. |

See the notes to arts. 171 & 171B. The application under this article is made by the legal representative of the plaintiff (or appellant) to set aside an order of abatement passed under sec. 366 on the death of the original plaintiff (or appellant). An order for abatement, passed on the death of the defendant (or respondent), under sec. 368, cannot be set aside under sec. 371.

In case of *insolvency* of the plaintiff, an order for abatement is called an order for *dismissal*. (See sec. 370.)

Before the passing of Act XII of 1879, art. 178 governed applications under sec. 371. (Bhoyrub *v.* Domun, I. L. R., 5 Calc., 139.)

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| 172.—By a purchaser at an execution-sale, to set aside the sale on the ground that the person whose interest in the property purported to be sold had no saleable interest therein. | Sixty days | ... The date of the sale. |

* Nos. 171A, 171B, & 171C have been inserted by Act XII of 1879.

See notes to art. 166. An application made under sec. 313 of the Code comes under this article. The Court executing the decree *may confirm* the sale after the expiry of the 30 days allowed by art. 166, and *before* the expiration of the 60 days allowed by art. 172. (Haji *v.* Athraman, I. L. R., 7 Mad., 512.) Art. 172 does not apply to an application for refund of the purchase-money under sec. 315 of the Code. (Sivaram *v.* Rama, I. L. R., 8 Mad., 99.)

| Description of application. | Period of limitation. | Time from which period begins to run. |
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| 173.—For a review of judgment, except in the cases provided for by No. 162. | Ninety days ... | The date of the decree or order. |

This article applies to applications for reviews of judgments (under sec. 623 of the Code) not being judgments of the High Court in the exercise of its *original* jurisdiction. (See art. 162.)

This article does not apply to an application for an order to set aside a dismissal by default or a judgment *ex parte*. (See arts. 163 & 164, and secs. 103 & 108 of the Code.) An application to *amend* a decree, under sec. 206 of the Code, is not governed by this article but by art. 178. (Gaya Prasad *v.* Sikri Prasad, I. L. R., 4 All., 23.)

As to the difference between amending a decree under sec. 206 and amending it under the Review sections, see Joykissen *v.* Ataoor, I. L. R., 6 Calc., 22.

An application for a *new trial* under sec. 21 of Act XI of 1865 (the Mofussil Small Cause Court Act) is not governed by this article, provided the circumstances of the case admit of a new trial, and *do not admit of a review*. (Madon *v.* Purno, I. L. R., 10 Calc., 297.)

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| 174.—By a creditor of an insolvent judgment-debtor, under section 353 of the Code of Civil Procedure. | Ninety days ... | The date of the publication of the schedule. |

An unscheduled creditor may, under sec. 353 of the Code, apply to have his name *inserted* in the schedule of creditors and debts, and a scheduled creditor may, under the same section, apply for an order *altering* the schedule in certain respects.

This article does not apply to a creditor wishing to prove his debt, where *no schedule* has been framed by the Court. Art. 178 applies to such cases. (Parshadi *v.* Chuney, I. L. R., 6 All., 142.)

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| 175.—For payment of the amount of a decree by instalments. | Six months ... | The date of the decree. |

Under sec. 210 of the Code, after the passing of a decree for the payment of money, the Court may, on the *application* of the judgment-debtor, and with the consent of the decree-holder, order that the amount decreed be paid by instalments.

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| 176.—Under the Code of Civil Procedure, section 516 or 525, that an award be filed in Court. | Six months ... | The date of the award. |

When a matter in dispute has been referred to arbitrators by the Court, and an award has been made, the correct procedure for the arbitrators is

to return the record with the award to the Court itself. (12 W. R., 397.) The act of an arbitrator in handing an award to the proper officer of the Court to be filed (under sec. 516 of the Code), is not an *application* within the meaning of this schedule. (Roberts *v.* Harrison, I. L. R., 7 Calc., 333.) The first portion of this article probably applies to an application by any of the *parties* to get the award filed by the arbitrators. (See p. 185, *supra.*)

When any matter has been referred to arbitration *without the intervention of a Court of Justice*, any person interested in the award of the arbitrators may (under sec. 525 of the Code) *apply* to a competent court that the award be filed. The date of the award is the date when it is given to the parties by the arbitrators. It would be unreasonable to hold that the day written on the award as when it was made is the date from which limitation commences to run. (See p. 193, *supra.*)

| Description of application. | Period of limitation. | Time from which period begins to run. |
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| 177.—For the admission of an appeal to Her Majesty in Council. | Six months ... | The date of the decree appealed against. |

An application under secs. 598 & 599 of the Civil Procedure Code falls within this article. The limitation for such an application was provided by sec. 599 of Act X of 1877, until that section was repealed by the present Limitation Act. The period of limitation, however, remained the same. But sec. 599 has been restored to its former place by Act XIV of 1882, and No. 177 of the Limitation Act must now be taken to be repealed, although, perhaps, that was not the intention of the Legislature. (Forut-un-nissa *v.* Mulo. I. L. R., 6 All., 250, 251.) It is *expressly* declared by sec. 599 that. if the period of six months expires when the court is closed, the application (to the court whose decree is complained of) may be made on the day the court re-opens. *Other* provisions of the Limitation Act are not referred to.

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| 178.—Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, section 230. | Three years ... | When the right to apply accrues. |

Art. 178 construed with some limitation.

Although arts. 162—164, 166—170, 172, 173, 175 and 177 do not *in terms* refer to the Code of Civil Procedure, an examination of all the articles relating to 'applications' in this schedule shows that the applications therein contemplated are such as are made under some section of the *Civil Procedure Code.* (Baimanekbai *v.* Manikji, I. L. R., 7 Bomb., 213.) *In re* Isben Chunder Roy, I. L. R., 6 Calc., 707, it was said that every article in this division of the schedule (No. 178 only excepted) specifically related to some case *pending* or already *decided.* This is strictly correct. except perhaps so far as an application under sec. 526 of the Code (see art. 176) is concerned. The *general* words in art. 178 must be construed with some *limitation* with reference to the words they follow. (Govind *v.* Rungomoney, I. L. R., 6 Calc., 60.) The application referred to in art. 178 must be an application *ejusdem generis* with the applications already specified. (See pp. 231, 232, *supra.*)

The proceeding to which art. 178 is applied must amount to an *application* by a party to suit. The act of an arbitrator in handing in an

award to the proper officer of the court under sec. 516 of the Civil Procedure Code is *not* an *application*. (Roberts *v.* Harrison, I. L. R., 7 Calc., 333.)

What applications are not governed by the art.

The application under art. 178 must further be an application for the exercise by the Court of powers which it would *not* be *bound* to exercise *without* such application. The article does not apply to applications to the Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character. (Kylash *v.* Ramasami, I. L. R., 4 Mad., 172; Vithol *v.* Vithojirao, I. L. R., 6 Bomb., 586.)

It has been further held that this article does not apply to an application to reconstitute a suit and restore it, when after the decree a reference is ordered, but the case is struck out of the reference list for want of prosecution. The article was not intended to govern every application to the Court in reference to its own list, such as an application to transfer a case from one board to another, to transfer a case to the bottom of the board or for change of attorneys, or so forth. (Govind *v.* Rungomoney, I. L. R., 6 Calc., 60.)

Art. 178 does not apply to an application by which a miscellaneous proceeding (as opposed to a regular suit) is initiated, such as, an application for the custody of minors under Act IX of 1861; an application for a certificate, under Act XL of 1858 or under Act XXVII of 1860; or an application for probate or letters of administration (I. L. R., 6 Calc., 707; I. L. R., 7 Bomb., 213); or an application to the District Court for the purpose of foreclosing a mortgage under Beng. Reg. XVII of 1806. These applications are not made under the Code of Civil Procedure, and are not *ejusdem generis* with the applications specified in the schedule.

As the Code of Civil Procedure *imperatively* requires the Court to grant to the purchaser a certificate of sale after the sale has been duly confirmed, an application by the purchaser to set the Court in motion to discharge its duty by executing and delivering such certificate is not governed by this article. (I. L. R., 4 Mad., 172; I. L. R., 6 Bomb., 586.) The grant of a certificate is hardly an act of a *judicial* character.

An application to the Court by one of the parties to a suit after it has been tried, to "pronounce judgment," or by a party to an award after it has been filed in Court, to "pass judgment according to the award," is not governed by art. 178. (Ishwar Dass *v.* Dosibai, I. L. R., 7 Bomb., 316.)

What applications are governed by the art.

As the Court is *not bound* to put an execution-purchaser into possession until such purchaser makes an application to the Court under sec. 318 of the Code, such application is governed by art. 178. The three years are to be computed from the date of the issue of the certificate. (Barsapa *v.* Morya, I. L. R., 3 Bomb., 433; Hanmantrav *v.* Subaji, I. L. R., 8 Bomb., 257.)

A right to apply for the *revival* of a suit for partition which had been decreed against the original defendant, who died after the decree but before the usual commission for partition had been issued, is a right which accrues from day to day. (Kedar *v.* Harra, I. L. R., 8 Calc., 420.)

An application to amend a decree under sec. 206 of the Code falls under this article. (Goya Pershad *v.* Sikri, I. L. R., 4 All., 23.) An application under sec. 372 of the Code not having been specially provided for, is governed by art. 178. (I. L. R., 8 Calc., 837.)

An application by the legal representative of a *decree-holder* for the entry of his name in the place of that of the decree-holder is governed

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ART. 178.

by this article. The three years are to be computed from the time of the death of the decree-holder, except where the execution was stayed at the time by an injunction. (I. L. R., 5 Bomb., 29.)

An application by a judgment-debtor asking the Court to ascertain and determine how much the judgment-creditor has been overpaid is probably governed by this article. Such an application is not an application for *execution* within the meaning of art. 179. (See Muthoora *v.* Mohunt, 22 W. R., 211.)

An application to revive a previous application for execution which had been temporarily suspended by an injunction, or by reason of an order under sec. 280 of the Code or other obstacle, is governed by this article. The three years are to be computed from the date on which the injunction or other obstacle is removed. (Kalyanbhai *v.* Ghanasham, I. L. R., 5 Bomb., 29; Buti *v.* Nehal, I. L. R., 5 All., 460.) In Booboo Payroo *v.* Syud Nazir Hossein, 23 W. R., 183, decided under the old law, Justice Markby threw out a vague suggestion that the decree-holder might lose his remedy if he were *dilatory or negligent* in pursuing it after the removal of the obstacle.

It has been held by a Division Bench of the Calcutta High Court, that an application to put up to sale a portion of property which the applicant has caused to be attached in execution of his decree is governed by this article, and that the application to sell such property must be disallowed if made more than three years after the date of attachment. (Joobraj *v.* Buhooria, 7 C. L. R., 424.) It may be doubted, however, if the right to apply for the sale of property does not accrue from *day to day*, so long as the property remains under attachment.

An application by Government or the Secretary of State for India in Council (*e. g.*, an application under sec. 411 of the Code) is not exempted from the operation of art. 178 or of any other article in this Division of the schedule. (Appaya *v.* The Collector, I. L. R., 4 Mad., 155.)

Sec. 622, Civ. P. C.

Art. 178 may apply to applications to the High Court under sec. 622 of the Code, or under the Charter Act, but such applications will, in the exercise of the Court's discretion, be refused if not made *without delay*. (See Durga Persad *v.* Sheo Churn, I. L. R., 4 All., 154; *In re* Russick Lall Chatterjee, 15 W. R., 518; *In re* Madhub Chunder Giri, I. L. R., 3 Calc., 243.)

Sec. 230, Civ. P. C.

Sec. 230 of the Code prohibits the grant of a second or later application for execution of a decree for the *delivery* of property or the *payment* of money after twelve years from the date of its becoming final, unless the judgment-debtor has, by fraud or force, prevented the decree from being executed. The effect of this provision is to *cut down* the right of a judgment-creditor to make an indefinite number of successive applications for the execution of an unsatisfied decree for money or other property. (Ashootosh *v.* Durgachurn, I. L. R., 6 Calc., 504.) Even if the second or later application for execution is not barred by the ordinary provisions of the Law of Limitation (art. 179), it may be barred by the provisions of sec. 230, provided a previous application for execution had been actually made under *that section*, and such application had been *granted* by the Court under sec. 245 of the Code. (Dewan Ali *v.* Soroshibala, 10 C. L. R., 111; (S. C.) I. L. R., 8 Calc., 297. See also I. L. R., 6 Calc., 504; I. L. R., 5 Bomb., 245; I. L. R., 2 All., 275; I. L. R., 1 Mad., 403.) An application on which only a notice under sec. 248 is issued, is not an application *granted* within the meaning of sec. 230. (Chengaya *v.* Appasami, I. L. R., 6 Mad., 172.) The second or later application here referred to is a substantive applica-

tion for execution under sec. 235 of the Code, and not merely an amending petition or an application to carry on proceedings already commenced. (Panaul *v.* Kishenmonee, 9 C. L. R., 297.) But an application for process against the person or the property of the debtor, in addition to or in lieu of processes already obtained, is an independent substantive application. (See Sreenath *v.* Yusoof, 9 C. L. R., 334; I. L. R., 7 Bomb., 214, 217.) As to *force or fraud*, see I. L. R., 4 Mad., 172, and I. L. R., 6 Mad., 365. Under sec. 230 of Act X of 1877 as it stood *before* it was amended by Act XII of 1879, it was necessary to satisfy the Court that due diligence had been used to obtain satisfaction under the previous order for execution. Under the law as it *now* stands, the question whether the decree-holder has acted with sufficient diligence or not does not arise. (See I. L. R., 6 Calc., 504.)

The last para. of sec. 230 of the Code of 1877 gave three years' grace to holders of decrees which were twelve years' old on the date on which it was passed, *viz.* the 30th March 1877. (Damodar *v.* Uttum, I. L. R., 7 Bomb., 214.) Sec. 230 of the present Code, which was passed on the 17th March 1882, gives decree-holders whose decrees were twelve years' old *on that date* a similar grace for three years from that date. But holders of decrees which were twelve years' old on the 30th of March 1877 or at any time before the 30th March 1880, and which have once enjoyed the benefit of the three years' grace under the Code of 1877, cannot claim another three years under the Code of 1882. A decree which has once become dead or unexecutable cannot be revived by a subsequent statute without express words to that effect. (See Musharaf *v.* Ghalib, I. L. R., 6 All., 189, F. B., as explained in Bhawani *v.* Daulat, I. L. R., 6 All., 388.) A Division Bench of the Madras High Court has gone further and held that an application for execution made and granted under sec. 230 of the Code of 1877, or anything done under that section of the Code of 1877, cannot affect an application made after the Code of 1882 came into force. It has been held by the same Bench that a decree of 1866, although it had enjoyed the benefit of the three years' grace under the Code of 1877, is protected for another three years by the last para. of sec. 230 of Act XIV of 1882. (Ganapathi *v.* Balasundra, I. L. R., 7 Mad., 540.)

Sec. 230 of the Code of Civil Procedure, which is expressly referred to in arts. 178 and 179 only, do not control the provisions of art. 180; so that a decree of the High Court on its Original Side may be executed even after the expiry of the twelve years mentioned in sec. 230. (Mayabhai *v.* Tribhuvandas, I. L. R., 6 Bomb., 258; Ganapati *v.* Balasundra, I. L. R., 7 Mad., 540.)

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| *179.—For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, section 230. | Three years; or, where a certified copy of the decree or order has been registered, six years. | 1 The date of the decree or order, or<br>2 (where there has been an appeal) the date of the final decree or order of the Appellate Court, or |

* The period during which the Collector can exercise, or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by secs. 322 to 325 of the Civil Procedure Code, shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of sec. 325*a* in respect of any remedy of which the decree-holder has thereby been temporarily deprived—sec. 325*a*, Civil Procedure Code.

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SECOND SCHEDULE—THIRD DIVISION: APPLICATIONS—(*contd.*)

| Description of application. | Period of limitation. | Time from which period begins to run. |
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| | | 3 (where there has been a review of judgment) the date of the decision passed on the review, or<br>4 (where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper court for execution, or to take some step in aid of execution, of the decree or order, or<br>5 (where the notice next hereinafter mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure, section 248, or<br>6 (where the application is to enforce any payment which the decree or order directs to be made at a *certain date**) such date.<br>*Explanation I.*—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number shall take effect in favour only of such of the said per- |

* The words "certain date" have been substituted for the words "specified date" by Act XII of 1879.

SECOND SCHEDULE—THIRD DIVISION: APPLICATIONS—(*contd.*) ACT XV OF 1877.

| Description of application. | Period of limitation. | Time from which period begins to run. | |
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| | | sons or their representatives as it may be made by. But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.<br>Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all.<br>*Explanation II.*—"Proper court" means the court whose duty it is (whether under section 226 or 227 of the Code of Civil Procedure or otherwise) to execute the decree or order. | ART. 179. |

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SECOND SCHEDULE—THIRD DIVISION: APPLICATIONS—(*contd.*)

"Application for the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, sec. 230."

ART. 179.

Application for execution of decree.

An "application for execution" is a substantive application under sec. 235 of the Code, or otherwise by which proceedings in execution are commenced, and not merely an incidental application to carry on proceedings already commenced. (See Chunder Coomar *v.* Bhogabutty, I. L. R., 3 Calc., 235; Penaul Huq *v.* Kishenmunee, 9 C. L. R., 297.) An application which is in substance an application made with the object of moving the Court to proceed in the matter of a former application which had been postponed or otherwise stayed is not governed by this article. (Raghubans *v.* Sheosaran, I. L. R., 5 All., 243; Issurree *v.* Abdool, I. L. R., 4 Calc., 415; Buti *v.* Nehal, I. L. R., 5 All., 459.) But a subsequent application for an altogether distinct process cannot be a continuance of previous proceedings. (I. L. R., 7 Bomb., 293; I. L. R., 7 Mad., 595.) As to what is or is not a *fresh* application, see notes to art. 178, and p. 655, *infra*. An application to *enforce an agreement* (sanctioned by the Court) by which execution is deferred, but is liable to be again proceeded with if the judgment-debtor makes default in paying certain instalments, is not an "application for the execution of a decree," though such application seeks as a *result* the execution of the original decree. (Sham *v.* Piari, I. L. R., 5 All., 596.) An application by the judgment-debtor asking the Court to ascertain how much the judgment-creditor has been overpaid, is *not* an application for the *execution* of a decree. (Muthoora *v.* Mohunt, 22 W. R., 211.)

Where in a suit for possession and mesne profits the Court *reserves* the enquiry as to the *amount* of mesne profits under sec. 212 of the Code, the decree for possession is only a *partial* decree in the suit. In such a case there is to be a further enquiry after the decree, and a *further* decree in respect of mesne profits. There can be no application for *execution* of the *decree* for mesne profits until the amount due is ascertained. (Dildar *v.* Mujudunnissa, I. L. R., 4 Calc., 629; Baroda *v.* Ferguson, 11 C. L. R., 17.)

What decrees or orders come under art. 179.

A *summary* decision or order as well as a decree or order made in a *regular* suit falls within this article. Under sec. 22, Act XIV of 1859, and art. 166, Act IX of 1871, one year only was allowed for the execution of *summary* decisions, such as those under sec. 53, Act XX of 1866. (See Mina Kenwari *v.* Juggut, I. L. R., 10 Calc., 196, P. C.) No. 180 applies to decrees of the High Courts of Calcutta, Madras, and Bombay in the exercise of their *ordinary original* civil jurisdiction, and to orders of Her Majesty in Council. An order for costs passed by the High Court in its Appellate Side, on the rejection of a petition for leave to appeal to Her Majesty in Council, is governed by art. 179. (See Hurro *v.* Bhupendro, I. L. R., 6 Calc., 201.)

As to the provisions of sec. 230 of the Code, see notes to art. 178.

What law applicable to applications made after the 1st Oct. 1877.

So long as Act IX of 1871 was in force, Act XIV of 1859 governed all applications for the execution of a decree passed in any suit instituted before the 1st April 1873. Act IX of 1871 was wholly repealed by Act XV of 1877. This latter Act contains no saving clause similar to that in sec. 1 of Act IX of 1871, which made the Act of 1871 inapplicable to any suit, or to any application in any suit, instituted before the 1st April 1873. Arts. 179 and 180 of Act XV of 1877, therefore, operate from the date on which they came into force as regards all *new* applications for execution made on or after the 1st October 1877. (See Becharam *v.* Abdul, I. L. R., 11 Calc., 55; Juggomohun *v.* Luchmessur, I. L. R., 10 Calc., 748; Gurupadapa *v.* Virbhadrapa, I. L. R., 7 Bomb., 459; and pp. 210, 219, and 507, *supra*.)

By reason of the provisions of sec. 6, Act I of 1868, applications for execution made before the 1st October 1877 and *pending* on that date

SECOND SCHEDULE—THIRD DIVISION: APPLICATIONS—(*contd.*)

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are governed by Act IX of 1871 or Act XIV of 1859, according as the suit in which the decree was passed was instituted after or before the 1st of April 1873. (See I. L. R., 10 Calc., 748, and p. 507, *supra.*)

Rulings under Act XIV.

For the provisions of secs. 20 & 21, Act XIV of 1859, on the subject of execution and the interpretation put upon them, see 6 W. R., Mis., 98, F. B.; 7 W. R., 515, F. B.; 14 W. R., P. C., 21; 17 W. R., 292, P. C.; 11 B. L. R., 23, P. C.; 21 W. R., 97, P. C.; I. L. R., 2 All., 792, P. C.; I. L. R., 3 Calc., 47, P. C.; and I. L. R., 10 Calc., 196, P. C.

Rulings under Act IX.

For the provisions of arts. 167 & 168, Act IX of 1871, on this subject and the interpretation put upon them, see 21 W. R., 410; 22 W. R., 512, F. B.; 23 W. R., 282; I. L. R., 1 All., 231; I. L. R., 2 Calc., 336, F. B.; I. L. R., 3 Calc., 235, F. B.; I. L. R., 3 Bomb., 294; I. L. R., 10 Calc., 851, F. B.

Date of application.

Where an informal application for execution is not dismissed, but allowed to be amended, the date of the amendment is *not* the date of the application. The original date on which the application was first made is the date of the application. (Fuzloor *v.* Altaf, I. L. R., 10 Calc., 541.) See notes to sec. 4.

Adjudication of question of limitation.

On the presentation of the last of a series of applications made for the execution of a decree, the Court may, and should, consider the question whether, on the date of making a prior application, the decree sought to be enforced was barred by limitation. The fact that the judgment-debtor, though served with a notice, under sec. 248 of the Code, did not, on that occasion, appear, or urge the plea of limitation, will not affect the question. (See 10 W. R., F. B., 8; and I. L. R., 3 Calc., 518.) If the Court did *not* then (for alleged want of authority or otherwise) *adjudicate* upon the question of limitation, it will not be debarred from trying the question now. (Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C.) But if the Court, on such prior application, had ordered execution to issue, or had otherwise adjudicated upon the question of limitation, it would be now precluded from trying the question again. The *principle* of the general doctrine of *res judicata* applies to execution cases. (See Mungul Persad *v.* Grijakant, I. L. R., 8 Calc., 51, P. C.; Ramkirpal *v.* Rupkuari, I. L. R., 6 All., 269, P. C.; and Bandey *v.* Romesh, I. L. R., 9 Calc., 65. See also pp. 98 and 511, *supra.*)

A court to which a decree has been transferred for execution has jurisdiction to determine whether or no such decree is barred by limitation. (Nursing *v.* Hurryhur, I. L. R., 5 Calc., 897; and Leake *v.* Daniel, 10 W. R., F. B., 10.)

Barred decree not invalid.

For purposes unconnected with *execution*, the *validity* of a decree is not affected by an application for its execution being barred by limitation. Such a decree, even if *ex parte*, would still be conclusive evidence of matters decided by it. (Birchunder *v.* Hurrish Chunder, I. L. R., 3 Calc., 388.)

Period of 3 or 6 years computed from what dates. Clauses 1 to 6.

Where a certified copy of the decree or order has been *registered*, the decree-holder gets six years instead of three years to execute his decree.

The period of limitation in the case of an ordinary decree is to be computed from the date of the decree or order, if there has been (*a*) no *appeal*, (*b*) no *review* of judgment, (*c*) no previous *application* for execution or to take some step in aid of execution, and (*d*) no *notice* issued under sec. 248 of the Code. But where the decree or order directs a payment to be made at a certain future date, the period of limitation for an application to enforce such payment is to be computed from such date, and not from the date of the decree or order. A decree for possession and mesne profits to be ascertained in execution is, so far as the decree for mesne profits is concerned, only an interlocutory order which does not become a final *decree* until the *amount* of

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mesne profits payable by the judgment-debtor *is ascertained* and directed to be paid. (Baroda *v.* Fergusson, 11 C. L. R., 17. See also I. L. R., 4 Calc., 629; I. L. R., 8 Mad., 137.)

Cl. 2. Where there has been an appeal.

The meaning of the words "where there *has* been *an* appeal," or of the words "*the final* decree or order of the Appellate Court," has not yet been definitely settled. There can be no doubt, however, that where the law allows an appeal from the decree or order which is sought to be executed, and an appeal has been actually preferred against such decree or order, and admitted by the Appellate Court, the date of the final decree or order of the Appellate Court is the point from which limitation runs.

The period of limitation is not to be computed from the date of the original decree, although that decree is *affirmed* by the Appellate Court. (See Luchman Pershad *v.* Kishen Persad, I. L. R., 8 Calc., 218, F. B.; and Ramchurn *v.* Lukhikant, 16 W. R., F. B., 1.) The decree of the Appellate Court is the final decree and *the* decree in the case, whether the decree of the lower Court is reversed, or modified or affirmed. (*Ibid.*) It has been held, in some cases *unconnected* with the interpretation of *this* article, that an order allowing an appeal to be *withdrawn*, or dismissing an appeal for *default*, cannot be treated as the final decree in the case. (See Hingan *v.* Ganga, I. L. R., 1 All., 293; Gour Chunder *v.* Gour Mohun, 5 W. R., Misc., 11; Virasami *v.* Monnomany, 4 Mad., 32.) Similarly, it has been said that an order dismissing a special appeal without confirming the decree of the lower Court does not supersede such decree. (17 W. R., 292, 297, P. C.) But these questions do not arise under cl. 2 of art. 179. Limitation as regards the execution of the original decree (supposing it has not been reversed or modified) runs from any final order passed on the appeal.

Even where execution has been applied for *before* the date of the Appellate Court's decree, the decree-holder will, in a *subsequent* application, be entitled to compute the period of limitation from the date of the Appellate Court's decree. (Venkataraayalu *v.* Narsimah, I. L. R., 2 Mad., 174. See also I. L. R., 2 All., 763.)

In the opinion of a Division Bench of the Calcutta High Court, even in a case where the law does not allow an appeal from a decree, the order of the Court to which an appeal *has actually* been preferred, rejecting the appeal on the ground that no appeal would lie, is the final order from which limitation runs. (Wazir Mahton *v.* Lulit Sing, I. L. R., 9 Calc., 100.) In this case it was observed by the Court that *any* order by which an appeal is disposed of, is the final order of the Appellate Court.

Where an appeal is presented but not admitted or registered, on the ground of deficiency of the court-fees, it cannot be said that there "has been appeal" within the meaning of this article. (Dianut *v.* Wajid, I. L. R., 6 All., 439.)

Appeal against a part of the decree.

The language of this clause is not inapplicable to cases where a *part* only of a decree has been appealed against. But it has been held that where one of three defendants against whom a decree has been passed appeals against the decree only so far as it affects *himself* and his *share* of the property, or where the decree against which he prefers an appeal does not proceed on any ground *common* to all the defendants, the appeal does not prevent time from running so far as the non-appealing defendants are concerned. Where, however, an appeal by one imperils the *whole* decree (see sec. 544 of the Code), time does not run against the decree-holder, even so far as the non-appealing defendants are concerned. (See Hurro Prosad *v.* Enayet, 2 C. L. R., 471; Mullick *v.* Mahomed, I. L. R., 6 Calc., 194; Sangram *v.* Bujarat, I. L. R., 4 All., 36.) In Gungamoyee *v.* Shib Sunker, 3 C. L. R., 430, and Basant Lal *v.* Naj-

munnissa, I. L. R., 6 All., 14, this qualification of the language of the article does not appear to have been approved of. In the former case it was observed, that in cl. 2 of this article, "there are no qualifying words as to *by* whom the appeal is to be made, or what the *nature* of this appeal to be made should be; but simply that when there *has* been *an* appeal, the time shall begin to run from the date of the *final* decree or order of the Appellate Court."

A sued B for possession of certain land and to recover damages. The Munsiff decreed possession, but dismissed the claim for damages. On appeal, the Judge affirmed the decree for possession, and remanded the case for adjudication as to the amount of damages due. In special appeal to the High Court, the Judge's decision as to possession was modified, but his order of remand was not interfered with. In the *meantime*, the Munsiff decreed damages, and on appeal that decree was confirmed by the Judge. An application for execution of this second decree of the Judge is not barred if made within three years of the decree of the High Court. (See Imam *v.* Dassandhi, I. L. R., 1 All., 508.) In this case the appeal to the High Court against the *whole* decree *imperilled* the Judge's order remanding the case as to the claim for damages, and the second decree of the Judge awarding damages *might* have been nullified if the High Court had interfered with the order of remand. Where, however, a suit for possession of land and of moveable properties having been decreed, defendant appealed as regards the *moveables only*, no question being raised in the Appellate Court in the matter of the land, it was held that (under sec. 20, Act XIV of 1859, which made no reference to appeals) the appeal and plaintiff's appearance in the Appellate Court to resist the appeal did not serve to keep in force the decree for the *land*. (Sreenath *v.* Brojonath, 13 W. R., 309.) Where the High Court, affirming the Judge's decision in part, remands the case for further investigation on certain points, and a final decree then passed by the Judge is subsequently upheld by the High Court in its entirety, limitation runs from the date of this *last* judgment. (Shaik Fuzl *v.* Doolun, 5 W. R., Misc., 6.)

Appeal from orders in *proceedings after* decree.

The appeal referred to in this clause is apparently an appeal from the decree or order which is sought to be executed, and not an appeal from an order dismissing an application to set aside the decree under sec. 108 of the Code. (See Sheo Persad *v.* Aurudh, I. L. R., 2 All., 175.) But in Lutful Huq *v.* Shumbhudin, I. L. R., 8 Calc., 248, it was held that as such an appeal really kept the decree open, it *was* an appeal within the meaning of this clause. Similarly it has been held that where an appeal from a decree passed on a *review* of judgment, sets aside the decree made on review, an application to execute the *original* decree is not barred, if it is made within three years of the order in the appeal. (Narsing *v.* Modho, I. L. R., 4 All., 274.) An appeal from an order passed in *course of execution* of a decree is, probably, *not an appeal* within the meaning of this clause, though where the order of the Appellate Court in the execution proceeding is itself capable of being executed, an application for the execution of such order will not be barred if made within three years from the date of the order. (See Hulasi *v.* Maiku, I. L. R., 5 All., 236.) Resisting an appeal preferred by the judgment-debtor from an order in an execution proceeding, is not sufficient to keep alive the original decree. (Kristo *v.* Mahabat, I. L. R., 5 Calc., 595.)

Appeal includes appeal to Privy Council.

The word 'appeal' includes an appeal to Her Majesty in Council, and the Judicial Committee of the Privy Council is an "Appellate *Court*" within the meaning of this article. (Narsing *v.* Narain, I. L. R., 2 All., 763. See also Gopal *v.* Joyram, I. L. R., 7 Calc., 620.)

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If the application is to enforce an order of Her Majesty in Council affirming a decree of the High Court on its *appellate* side, art. 180 will govern the case, in the same way as it governs such orders on appeals from the *original* side of the High Court. (Luchman *v.* Kishen Persad, I. L. R., 8 Calc., 218, F. B.) If, however, the application is only to execute the decree of the High Court, the order of Her Majesty in Council will give him a new start under cl. 2, art. 179. (See I. L. R., 2 All., 763.)

Cl. 3. Where there has been a review.

"(Where there has been a review of judgment) the date of the decision passed on the review." It is only where an application for a review has been *granted* and a decision passed on review, that this clause applies.

This clause does not indicate as to how time should run when the review is confined to a *part* only of the judgment and decree. But it has been held (in a case unconnected with the construction of this clause) that even where the application for review is granted in *part*, the amended decree is *the final* decree in the case. (Joykissen *v.* Ataoor, I. L. R., 6 Calc., 22.) Under Act XIV of 1859, though an *application* for review did not keep a decree alive, *opposition* to the application by the decree-holder was treated as a proceeding taken for *keeping* the decree *in force*. (Bibee Luteefun *v.* Raj Rup, 19 W. R., 185.) Resisting an appeal or a review does not give a new start under Act XV of 1877. *Resisting* is not *applying*. Besides, in the case of an appeal, nothing is done in the *proper* or first court. (See Kristo *v.* Mahabat, I. L. R., 5 Calc., 595.)

Cl. 4.

Under cl. 4 of art. 179, limitation runs from "the date of applying in accordance with *law* to the *proper* court for *execution*, or to take some *step in aid of execution* of the decree or order."

Proceeding to enforce or keep in force the decree under Act XIV.

Under sec. 20, Act XIV of 1859, limitation ran from the time of "some *proceeding* to *enforce* the decree or order, or to keep the same *in force*." Under arts. 167 and 168 of Act IX of 1871, limitation ran from "the date of *applying* to the Court to *enforce* or *keep in force* the decree or order." Under Act XIV, every application for execution *bonâ fide* made, and all acts done either by the Court or by an officer of the Court, or *bonâ fide* by the applicant, for enforcing a decree or keeping it in force, was sufficient to keep alive the decree. But the mere pendency of proceedings struck off the file for *want of prosecution* was not sufficient. (Ram Sahaye *v.* Degum Singh, 6 W. R., Misc., 98, F. B.) A merely *colorable* proceeding taken to save the time was insufficient. (Tabbur *v.* Motee, 8 W. R., 306.) So long as there was a *litis contestatio* between the parties, the *pendency* of a *bonâ fide* proceeding in which such contest arose took the case out of the operation of limitation. (Maharajah *v.* Bulram, 14 W. R., P. C., 21.) Where an execution-sale was stayed on condition that the subsisting attachment should remain in force, the striking off of the execution-proceedings did not affect the rights of the decree-holder. (Mungul Persad *v.* Grijakant, I. L. R., 8 Calc., 51, P. C.) An attachment operated as a continuing proceeding. (4 Mad., 316.) A *bonâ fide* application made to a court *without jurisdiction* might be sufficient. (Hiralall *v.* Budridas, I. L. R., 2 All., 792, P. C.)

Applying to enforce or keep in force the decree under Act IX.

Under Act IX of 1871, a perfectly abortive application which was *meant* by the execution-creditor to be abortive, and under which nothing whatever was done, served to keep the decree alive for three years from the date of such application. It was *not* necessary that the application should have been made *bonâ fide* with the object of reaping the fruits of the decree. (Eshan Chunder *v.* Prannath, 22 W. R., 512, F. B; Faiz Bux *v.* Sadut Ali, 23 W. R., 232.) The *pendency* of an application did not serve to keep the decree in force. Limitation commenced to run from the date of the application, and not from the date when such application

was disposed of. (23 W. R., 282.) It was otherwise under Act XIV of 1859. (Shurut *v.* Abdool, 23 W. R., 327.)

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It was at first laid down by the Calcutta High Court that an "application to *enforce* a decree" in Act IX of 1871 meant an application (under sec. 212, Act VIII of 1859, corresponding to sec. 235 of the present Civil Procedure Code) by which proceedings in execution were *commenced*, and not an application of an incidental kind made during the pendency of such proceedings. (Chunder Coomar *v.* Bhogobatty, I. L. R., 3 Calc., 235, F. B.) It was also suggested in this last case that under Act IX the decree-holder could apply to the Court *simpliciter* "to keep the decree in force," and that he could get a new start from the date of such application. In Ambica Persad *v.* Surdhari Lall (I. L. R., 10 Calc., 851, F. B.), Sir R. Garth, C. J., explained the former Full Bench ruling, and declared that the language used by the Court on that occasion was unduly narrow. An application for the issue of a sale proclamation during the pendency of an execution-proceeding *is*, it has been pointed out, an "application to *enforce* the decree;" but *payment* into court of the costs of a proclamation of sale by *challan* is not such an *application*. The learned Chief Justice did not in this case say anything as to the meaning of the words "to keep the decree in force."

*Applying simply to keep the decree in force.*

An application simply asking the Court "to keep the decree in force" is seldom heard of in practice, and is not provided for or contemplated in the Code of Civil Procedure. The interpretation which was put upon the same words in sec. 20 of Act XIV of 1859, was probably adopted by the Legislature in 1871. But that which was a *proceeding* under Act XIV was not necessarily an *application* under Act IX. The words "to enforce" or "to keep in force" are not to be met with in cl. 4 of art. 179 of the present Limitation Act. The words "to take some step in aid of execution" are somewhat more comprehensive. (See I. L. R., 10 Calc., 851, 855.) But these words or any other words in art. 179 do not cover an application which *simply* asks the Court "to keep the decree in force." Such an application is not made in accordance with any provisions of the Code, and cannot give a new start. (Gurupadapa *v.* Virbhadrapa, I. L. R., 7 Bomb., 459.)

*Applying for execution, or to take some step in aid of execution, under Act XV.*

The point from which limitation runs under this clause is the date of *applying* for *execution*, under sec. 235 of the Civil Procedure Code, or the date of *applying* to take some *step* in aid of execution. The application must, however, be made to the *proper* court and in accordance with *law*. The question of the *bona fides* of the application does not arise under this Act, as it did not under Act IX of 1871. The fact that a proceeding in execution has been pending for some time is not taken into consideration. It is the date of *applying* to the Court to *commence* execution-proceedings, or to *take some step* during the pendency of such proceedings, which has to be considered. The date of applying means not any day on which an application may be *pending*, but a certain day, the day when it is made or presented. (See Fakir *v.* Gholam, I. L. R., 1 All., 580, F. B.) The *termination* of an execution-proceeding does not give a new start, but if an application properly made has not been finally disposed of, in consequence of an injunction or some other obstacle, the decree-holder may treat his former application as still subsisting, and (within three years of the removal of the obstacle) ask the Court to proceed upon it. (See I. L. R., 5 Bomb., 29; I. L. R., 4 Calc., 415, and the notes to art. 178.) If, after the removal of the obstacle, the decree-holder asks the Court to issue a new process of attachment or arrest for which he had not applied before, his application must be treated as a fresh application for execution and not merely as an application to *continue* or *revive* the former proceeding. (Krishnaji *v.* Anandrav,

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I. L. R., 7 Bomb., 293; Khairunnissa *v.* Gauri Shankar, I. L. R., 3 All., 484; Virasami *v.* Athi, I. L. R., 7 Mad., 593; Ramsundur *v.* Gopessur, I. L. R., 3 Calc., 716.) Where money deposited in court, or the sale-proceeds of the debtor's property, are paid to the decree-holder, and the execution-proceedings are finally disposed of, but for some reason or other the decree-holder, being obliged to *refund* the money, applies for execution, his application is not necessarily an application to *continue* the former proceedings. (See 24 W. R., 143; I. L. R., 3 All., 484; and compare I. L. R., 4 Calc., 415.)

Applying in accordance with *law.*

An application for the execution of a decree made to a proper court by a proper person is an application made according to *law*, although, on considering the application with the decree, the Court may refuse the order sought, on the ground that it is not warranted by the terms of the decree. An application for the *partial* execution of a *joint* decree by one of several decree-holders is, in this sense, an application in accordance with *law*, and would serve to keep alive the right to execute. (Ponnampilath *v.* Ponnampilath, I. L. R., 3 Mad., 79.) But the Allahabad High Court have, in more than one case, considered such an application as *not* made in accordance with *law*, that is, not in accordance with the provisions of sec. 231 of the Procedure Code. (See The Collector *v.* Surjun, I. L. R., 4 All., 72.) Where the Court in execution can only forward copies of its decree for the *information* of the Collector, an application for the issue of *orders* to the Collector (in execution of a Civil Court decree in respect of certain settlement proceedings) has been held by the same Court to be "not in accordance with law." (Muhammad *v.* Kamila, I. L. R., 4 All., 34.) It has been held by the Madras High Court that an application may have been made "in accordance with law," though it was *insufficiently stamped.* (Ramasami *v.* Seshayyangar, I. L. R., 6 Mad., 181.)

An application by the *real* transferee of a decree (to the Court which passed the decree) to execute the decree, is a valid application under sec. 232 of the Code, but an application by the *benamidar* is not an application made "in accordance with law." (Abdul *v.* Chukhun, 5 C. L. R., 253; Denonath *v.* Lalit, I. L. R., 9 Calc., 633.) An application for execution by the legal representatives of a deceased decree-holder is a valid application. An order for substitution of names on the record is not a condition precedent to the attaching of the representatives' right to apply for execution. (Narayana *v.* Karruppa, 5 Ind. Jur., 411; Rivaz, 200.)

Except under sec. 232 of the Code or under some other express provision of the law, an application for execution must be made by the decree-holder then on the record. (See 24 W. R., 10.) But where, owing to an error in procedure, a decree was passed in favor of a firm, in the name of an agent of the firm, and applications for execution were made by a person who succeeded such agent as the agent of the firm, it was held (under Act IX of 1879) that these applications, however *irregular*, were *not invalid.* (Lachman *v.* Patni, I. L. R., 1 All., 510.)

An application made *after* the time prescribed for it, is not an application made "in accordance with law." (Nilmoney *v.* Ramjeebun, 8 C. L. R., 335.) But if such application is granted by the Court, and such order is not set aside on appeal, the judgment-debtor will, in future, be estopped from questioning the validity of the application. (See I. L. R., 8 Calc., 51.) If an application for execution is *refused* on the ground that it is barred, and the order is not set aside on appeal, the decree-holder can *not* make a *fresh* application. (I. L. R., 9 Calc., 65.)

Applying to the *proper* court.

The application must also be made to the *proper court*, that is, it must be made to the court whose business it is, either by transfer or otherwise, to execute the decree. (See Expl. II, and Prokash *v.* Poorno, 21 W.

R., 410.) An application to the Judge's Court, in respect of a decree passed by the Court of the Munsiff or Subordinate Judge, is not an application to the *proper* court, unless the decree has been transferred to the former court. (See I. L. R., 5 Calc., 595.) Even a *bonâ fide* application made to a court *without* jurisdiction is not an application to a *proper* court, but the time during which such application was pending, before it was finally rejected, may be excluded in the computation of the period of limitation. (See sec. 14.)

Applying to take some "*step* in aid of execution."

Even an *oral* application by the decree-holder or his vakil to take some step in aid of execution is an application within the meaning of this article. (See Amar *v.* Tika, I. L. R., 3 All., 139; Ali *v.* Guru Persad, I. L. R., 5 All., 344; Dharanamma *v.* Subba, I. L. R., 7 Mad., 306.)

An application for the *transfer* of a decree, under the provisions of sec. 223 of the Code, is a step in aid of execution. (Lutchman *v.* Maddan, I. L. R., 6 Calc., 513; Collins *v.* Maula Buksh, I. L. R., 2 All., 284.) An application to *re-transfer* a decree to the court which originally passed it, is also a step in aid of execution. (Krishnayyar *v.* Venkayyar, I. L. R., 6 Mad., 81.) An application to take some step in aid of execution is not necessarily an application for a warrant of attachment or arrest. It includes an application which is in the nature of a mere preparation to apply for execution. An application to get something without which an application to attach the debtor's property cannot be made, is a step in aid of execution, provided the application is made to the court executing the decree. (Kunhi *v.* Seshagire, I. L. R., 5 Mad., 141.) An application for a certificate of heirship, or an application for probate or letters of administration not being an application to the *court executing* the decree, cannot keep alive the decree, or give a new start. (See 4 Mad., 89, 148.)

An application for attachment or arrest is an application to enforce the decree and a step in aid of execution. (See Jamnadas *v.* Lalitram, I. L. R., 5 Bomb., 294.)

It has been held that the deposit of *nilamee* fees, that is, costs of bringing certain property to sale in execution, is a step in aid of execution. (Radha Prosad *v.* Sunder Lall, I. L. R., 9 Calc., 644.) An application for the issue of a fresh proclamation of sale is an application to enforce the decree, and therefore a step in aid of execution. (See Amar Sing *v.* Tika, I. L. R., 3 All., 139; Ambica *v.* Surdhari, I. L. R., 10 Calc., 851. F. B. But cf. I. L. R., 3 All., 484.)

An application by the decree-holder to summon witnesses in a proceeding originating in a claimant's application objecting to the attachment of property in execution, has been held to be a step in aid of execution. (Ali *v.* Gur Prasad, I. L. R., 5 All., 344.)

An application by a decree-holder praying that the objections taken by the debtor to the sale of property should be disallowed and the sale confirmed, is also a step in aid of execution. (Kewal *v.* Khadim, I. L. R., 5 All., 576.) Confirmation of sale by the Court of its *own* motion is not such a step. (Mohendro *v.* Mohendro, 10 C. L. R., 330.)

Where the vakil of the decree-holder partially consents to the debtor's application to postpone the sale of the properties attached, but *insists* that *some* of the properties should be sold at once, the act of the vakil is a step in aid of execution. (Dharanamma *v.* Subba, I. L. R., 7 Mad., 306. But cf. I. L. R., 3 All., 484.)

An application by the decree-holder to stay the sale but to *continue* the attachment, is one to keep in force the decree and, *perhaps*, a step in aid of execution. (See Nukanna *v.* Ramsami, I. L. R., 2 Mad., 218.)

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An application by a decree-holder for the postponement of a sale, on the ground that he has allowed the judgment-debtor time, is not a step in *aid* of execution. (Mainath *v.* Dabi Baksh, I. L. R., 3 All., 757. But see I. L. R., 3 All., 320; I. L. R., 4 All., 60; and 5 C. L. R., 515.)

What are *not* steps in aid of execution.

A written application by the *judgment-debtor* praying for additional time for *payment* of the amount of the decree, though not a step in aid of execution, is an acknowledgment within the meaning of sec. 19. (Toree *v.* Mahomed, I. L. R., 9 Calc., 730.)

An application by a decree-holder to be paid the proceeds of a sale in execution, is *not* an application to take a *step in aid of execution.* (Hem Chunder *v.* Brojo Soondery, I. L. R., 8 Calc., 89; Fazl Imam *v.* Mitta Singh, I. L. R., 10 Calc., 549. See also I. L. R., 11 Calc., 227. But see 8 W. R., 274.) The Madras and the Allahabad High Courts are of a different opinion. (See Venkatarayala *v.* Narasimha, I. L. R., 2 Mad., 174; Paran Sing *v.* Jawahir, I. L. R., 6 All., 366.)

An application by the decree-holder to obtain leave to bid for some property then up for sale is *not* an application asking the Court to take any step in aid of the execution. (Toree *v.* Mahomed, I. L. R., 9 Calc., 730.) The Calcutta High Court has in several cases construed the words of this clause *less liberally* than some of the other High Courts.

Where, after an execution case has been struck off, an application is made, by a person whose name has *not* been substituted for that of the decree-holder on the *record*, to get back the copy of the decree, such application, although made for purposes of execution, cannot be considered as a step in aid of execution. (See Gunga *v.* Debi, I. L. R., 11 Calc., 227.)

When during the pendency of an application for execution, the decree-holder dies, and his son not only applies to have his name substituted on the record, but prays that money should be levied under the decree and paid to him, his application is an application to *enforce* the decree, and therefore a step in aid of execution. (Govind *v.* Appaya, I. L. R., 5 Bomb., 246.)

Cl. 5. Issue of notice.

A notice to show cause why the decree should not be executed, issued by the Court under sec. 248 of the Code, gives a new start, although the preceding application for execution is defective or irregular. (Beharilall *v.* Salik Ram, I. L. R., 1 All., 675.)

The date of issuing the notice is the date on which the order directing the issue is signed by the Court. (1 Weekly Notes, Allahabad, 147; Rivaz, p. 204.)

The *issue* of a writ of attachment or a warrant of arrest does not give a new start, but an *application* for such a writ or warrant (being a step in aid of execution) does.

Cl. 6. Execution of decree for payment to be made at a certain future date.

In the case of a decree payable by instalments with a *proviso* that, if default be made in payment of one instalment, the *whole* shall become due, limitation runs from the date of the first default. So far as the execution of the *whole* decree is concerned, even where the decree-holder waives the benefit of the proviso, he is not entitled to count the period of limitation from the date of any subsequent default. (See Dulsook *v.* Chugon, I. L. R., 2 Bomb., 356; Shibdat *v.* Kalka Persad, I. L. R., 2 All., 443; Asmatullah *v.* Kally, I. L. R., 7 Calc., 56; and the notes to art. 75, at p. 583, *supra.*) The *same* rule has been applied to a case where a decree for *possession* of land contained a proviso that so long as the defendant paid the plaintiff Rs. 180 a year in three instalments, the decree should not be executed, but that if default were made in payment of three such instalments, the plaintiff should be entitled to delivery of the land. (Ugronath *v.* Langaumani, I. L. R., 4 All., 83.) As to when the decree-holder may be estopped from enforcing the *penalty* under such a *proviso*, and when he may be estopped from reverting to an enforce-

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ment of the *instalments*, see Radha Prasad *v.* Bhagwan, I. L. R., 5 All., 289.

A mere *agreement* of the *parties*, by which the decree-holder binds himself to accept payment of his decree by *instalments*, does not bring the case under this clause. Limitation in such a case runs, as usual, from the date of the decree. (See Kristo Komul *v.* Hurree Sirdar, 13 W. R., F. B., 44.) But if such agreement has been sanctioned by the Court, an application to enforce the agreement will be governed by art. 178. (Sham *v.* Piare, I. L. R., 5 All., 596.)

As to instalment decrees under Act VIII of 1869 (Bengal Council) to which cl. 6 does not apply, see Gureebullah *v.* Mohun Lall, I. L. R., 7 Calc., 127; Momtazul *v.* Nisbai, I. L. R., 9 Calc., 711, and p. 192, *supra*.)

Explanation I.

Expl. I.—As to applications for the execution of decrees passed *severally* in *favor* of more persons than one, see 13 W. R., 244.

As to applications for the execution of decrees passed *jointly* in *favor* of more persons than one, see 1 W. R., Misc., 2; 6 W. R., Misc., 59, 79; 16 W. R., 29; I. L. R., 4 All., 72, and I. L. R., 3 Mad., 79.

As to applications for the execution of decrees passed *severally against* more persons than one, see 19 W. R., 30, F. B.

As to applications for the execution of decrees passed *jointly against* more persons than one, see 6 W. R., Misc., 25, and 9 W. R., 25.

(Most of these cases are referred to in a note at p. 232, I. L. R., 1 All.)

Execution against one of several legal representatives of a deceased judgment-debtor comes under the last head. Application against *one* takes effect against *all*. (Ram Anuj *v.* Hingul Lal, I. L. R., 3 All., 517.)

A decree for *partition* is a joint declaration of the rights of persons interested in the property of which partition is sought. Execution-proceedings taken by *one* shareholder, whether plaintiff or defendant, may be considered as taken on behalf of all. (Sheikh Khoorshed *v.* Nubbee, I. L. R., 3 Calc., 551.)

Where a decree is of a complex nature, and grants different kinds of *relief* to be obtained by processes of different kinds, *separate* applications for execution may be made. A decree for possession of land, mesne profits and costs may be executed as regards one or two of the reliefs granted, and such partial execution did, under the old law, keep alive the decree as regards the other reliefs. (See Ram Buksh *v.* Madat Ali, 7 N. W. P., 95; see also 8 W. R., 99 & 274; 25 W. R., 70.)

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| *180.—To enforce a judgment, decree or order of any court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of Her Majesty in Council. | Twelve years | When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right: provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some in- |

* See sec. 325*a* of the Civil Procedure Code, and the foot-note under No. 179.

ACT XV OF 1877.

ART. 180.

SECOND SCHEDULE—THIRD DIVISION: APPLICATIONS—(*contd.*)

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| | | terest on such money, has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments or acknowledgments, as the case may be. |

Sec. 19, Act XIV of 1859, which corresponded to this article, spoke of *all* decrees of courts established by Royal Charter, but it was held that the section did not apply to decrees of the High Courts on their appellate sides. (See 5 Mad., 215; 16 W. R., F. B., 1; 17 W. R., 292, P. C., and p. 194, *supra.*) Art. 169 of Act IX adopted these rulings and *expressly* referred to decrees of such courts in the exercise of their ordinary original civil jurisdiction. Art. 180 of Act XV re-enacts the same rule. It was doubtful whether what are termed the decrees of the Privy Council were subject to any limitation. (See the remarks of the Privy Council in 17 W. R., 292, on the Calcutta Full Bench ruling in 16 W. R., F. B., 1.) Sec. 21 of Act VI of 1874 *expressly* applied the twelve years' rule to the execution of an order of Her Majesty in Council. As to the procedure which should be observed in enforcing such an order, see 18 W. R., 175, P. C.

An order of the Privy Council merely affirming the decree of the High Court is none the less governed by this article. (I. L. R., 8 Calc., 218, F. B.)

As to *revivors*, see I. L. R., 6 Calc., 504; 9 C. L. R., 557, and p. 62, *supra.* The process of *reviving* a judgment has its equivalent in the proceeding prescribed by sec. 248 of the Code of Civil Procedure, and the order made under that section (after notice to show cause why execution should not issue) *revives* the decree within the meaning of this article.

As to acknowledgments under this article, see pp. 273, 281, 289, 290, 305 & 306, *supra.*

As to payments under this article, see pp. 310, 311, & 324, *supra.*

The provisions of sec. 230 of the Code do not apply to applications for execution referred to in this article. (See I. L. R., 6 Bomb., 258; I. L. R., 7 Mad., 540; and the notes to art. 178.)

An order rejecting an application for leave to appeal to Her Majesty in Council under secs. 598 & 601 of the Code, is an order of the *Court whose decree is complained of.* (See I. L. R., 6 Calc., 201.)

# THE LIMITATION CLAUSES OF BENGAL ACT VIII OF 1869.

*The Law of Landlord and Tenant in the Provinces subject to the Lieutenant-Governor of Bengal.*

Limitation of certain suits.

XXVII. All suits instituted for the recovery of damages on account of the illegal exaction of rent, or of any unauthorized cess or impost, or on account of the refusal of receipts for rent paid, or on account of the extortion of rent by confinement or other duress, or on account of the excessive demand of rent, and all suits for abatement of rent, and all suits to eject any ryot or to cancel any lease on account of the non-payment of arrears of rent, or of the breach of the conditions of any contract by which a ryot may be liable to be ejected, or a lease may be liable to be cancelled, and all suits to recover the occupancy of any land, farm or tenure from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same, and all suits arising out of the exercise of the power of distraint for arrears of rent conferred on zemindars and others by this or any other Act or out of any acts done under color of the exercise of the said power, shall be commenced *within the period of one year* from the date of the accruing of the cause of action, and not afterwards.

Limitation of suits for grant of pottahs, &c.

XXVIII. Suits for the delivery of pottahs or kubooliyats and for the determination of the rates of rent at which such pottahs or kubooliyats are to be delivered, may be instituted *at any time* during the tenancy.

Limitation of suits for arrears of rent.

XXIX. Suits for the recovery of arrears of rent shall be instituted *within three years* from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fuslee or Willayuttee year in which the arrear claimed shall have become due; provided that if the suit be for the recovery of rent at a higher rate than was payable in the previous year, such rent having been enhanced after issue of notice under Section XIII of Act X of 1859, or under Section XIV of this Act; and the enhancement not having been confirmed by any competent Court, the suit shall be instituted *within three months* from the end of the Bengal year,

ACT VIII OF 1869.

or of the month of Jeyt of the Fuslee or Willayuttee year, on account of which such enhanced rent is claimed.

Limitation of suits against agents for money, papers or accounts.

XXX. Suits for the recovery of money in the hands of an agent or for the delivery of accounts or papers by an agent, may be brought *at any time* during the agency or *within one year* after the determination of the agency of such agent; provided that if the person having the right to sue shall, by means of fraud, have been kept from the knowledge of the receipt of any such money by the agent, or if any fraudulent account shall have been rendered by the agent, the suit may be brought *within one year* from the time when the fraud shall have been first known to such person; but no such suit shall in any case be brought at any time exceeding *three years* from the termination of the agency.

Suit for further balance to be instituted within six months of service of notice of deposit.

XXXI. Whenever a deposit on account of rent shall have been made under the provisions of this Act, or of Act VI of 1862, passed by the Lieutenant-Governor of Bengal in Council, no suit shall be brought against the person making the deposit, or his representatives on account of any rent which accrued due prior to the date of the deposit, unless such suit be instituted *within six months* from the date of the service of the notice in Section V of the said Act VI of 1862, or in Section XLVII of this Act mentioned.

No execution to be issued after three years from date of judgment.

LVIII. No process of *execution* of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in Sections XXVII, XXVIII, XXIX, or XXX of this Act after the lapse of *three years* from the date of such judgment, unless the judgment be for a sum exceeding five hundred rupees, in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of the Court.

Application for sale.

LXXVIII. *Within five days* from the time of the storing of any distrained crops or products, or if the crops or products do not from their nature admit of being stored, *within five days* from the time of making the distress, the distrainer shall *apply* for sale of the same to the

Court which would have jurisdiction to entertain a suit for the rent for which the distress was made.



LXXX. Immediately on receipt of any application under the provisions of the next preceding section, the Court to which such application shall have been made shall appoint an officer to conduct the sale of such property, and shall cause to be served a notice [which shall be in the form contained in the Schedule (C) to this Act, or to the like effect] on the person whose property has been distrained requiring him either to pay the amount demanded, or to institute a suit to contest the demand before such Court *within the period of fifteen days* from the receipt of the notice; and shall at the same time cause to be affixed upon some conspicuous place in the Court-house a proclamation fixing a day for the sale of the distrained property, which shall not be less than twenty days from the date of the application; and shall deliver a copy of the proclamation to the peon charged with the service of the notice, to be put up by him in the place where the distrained property is deposited. The proclamation shall contain a description of the property, the demand for which it is to be sold, and the place where the sale is to be held.

Procedure by Civil Court on receipt of application.

LXXXII. Any person whose property has been distrained in the manner in this Act provided, *may* institute a suit to contest the demand of the distrainer *immediately* after the distraint of his property, and before the issue of notice of sale; when such suit is instituted, the Court shall suspend proceedings in respect of the sale of such property.

Suit to contest distrainer's demand before issue of notice of sale.

XCVI. If any person shall claim as his own property which has been distrained for arrears of rent alleged to be due from any other person, such person may institute a suit against the distrainer and such other person to try the right to the possession of the property in such Court, and in like manner and under the *same conditions as to the time of instituting the suit* and to the consequent postponement of sale, as a person whose property has been distrained for an arrear of rent alleged to be due from him may institute a suit to contest the demand. When

Any person whose property has been distrained for arrears of rent alleged to be due from another, may institute a suit against the distrainer.

ACT VIII OF 1869.

any such suit is instituted, the property may be released upon security being given for the value of the same. If the claim is dismissed, the Court shall make an order for the sale of the property or the recovery of the value thereof, as the case may be, for the benefit of the distrainer, and for payment of such costs of suit to such distrainer, as to such Court shall seem fit. If the claim is upheld, the Court shall decree the release of the distrained property with costs, and such damages (if any) as the circumstances of the case may seem to require: provided always that no claim to any produce of land liable to distraint under this Act, which at the time of the distress may have been found in the possession of a defaulting cultivator, whether such claim be in respect of a previous sale, mortgage, or otherwise, shall bar the prior claim of the person entitled to the rent of the land; nor shall any attachment in execution of a judgment or decree of any Court prevail against such prior claim.

Persons prevented from suing in time to save their property from sale may sue for damages.

XCVII. If any person, whose property has been distrained for the recovery of a demand not justly due, or of a demand due or alleged to be due from some other person, is prevented by any sufficient cause from bringing a suit to contest the demand or to try the right to the property, as the case may be, within the period allowed by Sections LXXXII and XCVI, and his property is in consequence brought to sale, he may nevertheless institute a suit under this Act to recover damages for the illegal distress and sale of his property.

Also persons aggrieved by any illegal act of distrainer.

XCVIII. If any person empowered to distrain property or employed for the purpose under a written authority by a person so empowered, shall distrain or sell, or cause to be sold, any property for the recovery of an arrear of rent alleged to be due otherwise than according to the provisions of this Act, or if any distrained property shall be lost, damaged or destroyed by reason of the distrainer not having taken proper precautions for the due keeping and preservation thereof, or if the distraint shall not be immediately withdrawn when it is required to be withdrawn by any provision of this Act, the owner of the property may institute a suit under this Act to recover damages for any injury which he may have thereby sustained.

XCIX. If any person not empowered to distrain property under Sections LXVIII and LXX of this Act, nor employed for the purpose under a written authority by a person so empowered, shall under color of this Act distrain or sell or cause to be sold any property, the owner of the property may institute a suit under this Act to recover damages from such person for an injury which he may have sustained from the distraint or sale. The said person shall, when the Act complained of does not amount to criminal trespass, be liable to fine which may extend to three hundred rupees or to imprisonment, simple or rigorous, which may extend to two months, or to both, in addition to any damages which may be awarded against him in such suit.

Act VIII of 1869.

Unlawful distraint.

C. Provided always that any suit which may be instituted under any of the last three sections shall be commenced *within three months* from the date of the occurrence of the cause of action.

Time for commencing suits for damages.

CIII. No application for a *review* of any judgment or order passed in any suit brought under the provisions of this Act shall be received by any Court after the expiration of *thirty days* from the date of such order or judgment, but nothing in this section contained shall be deemed to apply to the High Court of Judicature at Fort William in Bengal.

Review of judgment.

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## THE LIMITATION CLAUSES
## OF
# THE BENGAL TENANCY ACT, VIII OF 1885.

184. (1) The suits, appeals and applications specified in Schedule III annexed to this Act shall be instituted and made within the time prescribed in that schedule for them respectively; and every such suit or appeal instituted, and application made, after the period of limitation so prescribed, shall be dismissed, although limitation has not been pleaded.

Limitation in suits, appeals and applications in Schedule III.

(2) Nothing in this section shall revive the right to institute any suit or appeal or make any application which would have been barred by limitation if it had been instituted or made immediately before the commencement of this Act.

ACT VIII OF 1885.

Portions of the Indian Limitation Act not applicable to such suits, &c.

185. (1) Sections 7, 8 and 9 of the Indian Limitation Act, 1877, shall not apply to the suits and applications mentioned in the last foregoing section.

(2) Subject to the provisions of this chapter, the provisions of the Indian Limitation Act, 1877, shall apply to all suits, appeals and applications mentioned in the last foregoing section.

## THE THIRD SCHEDULE.

### PART I.—SUITS.

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 1.—To eject any tenureholder or raiyat on account of any breach of a condition in respect of which there is a contract expressly providing that ejectment shall be the penalty of such breach. | One year ... | The date of the breach. |
| 2.—For the recovery of an arrear of rent— | | |
| (a) when the arrear fell due before a deposit was made under section 61 on account of the rent of the same holding : | Six months .. | The date of the service of notice of the deposit. |
| (b) in other cases ... | Three years ... | The last day of the Bengali year in which the arrear fell due, where that year prevails, and the last day of the month of Jeyt of the Amli or Fasli year in which the arrear fell due, where either of those years prevails. |
| 3.—To recover possession of land claimed by the plaintiff as an occupancy-raiyat. | Two years ... | The date of dispossession. |

## THE THIRD SCHEDULE.—(*Continued.*)

### PART II.—*Appeals.*

| Description of appeal. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| From any decree or order under this Act, to the Court of a District Judge or Special Judge. | Thirty days ... | The date of the decree or order appealed against. |
| From any order of a Collector under this Act, to the Commissioner. | Thirty days ... | The date of the order appealed against. |

### PART III.—*Applications.*

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|---|
| 6.—For the execution of a decree or order made under this Act, or any Act repealed by this Act, and not being a decree for a sum of money exceeding Rs. 500, exclusive of any interest which may have accrued after decree upon the sum decreed, but inclusive of the costs of executing such decree; except where the judgment-debtor has by fraud or force prevented the execution of the decree, in which case the period of limitation shall be governed by the provisions of the Indian Limitation Act, 1877. | Three years ... | (1) The date of the decree of order; or (2) where there has been an appeal, the date of the final decree or order of the Appellate Court; or (3) where there has been a review of judgment, the date of the decision passed on the review. |

ACT XII OF 1879.

# ACT No. XII OF 1879.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the 29th July*, 1879.)

*An Act to amend the Code of Civil Procedure, the Registration Act*, 1877, *and the Limitation Act*, 1877.

AND whereas it is also expedient to amend the Indian Limitation Act, 1877, in manner hereinafter appearing; It is hereby further enacted as follows :—

Amendment of Act XV of 1877, schedule II.

108. In the second schedule to the said Indian Limitation Act, 1877—

for No. 161, the following shall be substituted (namely) :—

| | | |
|---|---|---|
| "161.—For the issue of a notice under section 258 of the same Code to show cause why the payment or adjustment therein mentioned should not be recorded as certified. | Twenty days | When the payment or adjustment is made." |

to No. 166, column one, the following words shall be added (namely): "or on the ground that the decree-holder has purchased without the permission of the Court";

to No. 171, column one, the words "or appellant" shall be added; and in column three, after the word "plaintiff's," the words "or appellant's" shall be inserted;

after No. 171, the following shall be inserted (namely) :—

| | | |
|---|---|---|
| "171A.—Under section 366 of the same Code, by the defendant. | Sixty days ... | The date of the plaintiff's death. |
| "171B.—Under section 368 of the same Code, to have the representative of a deceased defendant made a defendant. | Ditto ... | The date of the defendant's death. |
| "171C.—Under section 371 of the same Code, for an order to set aside an order for abatement or dismissal. | Ditto ... | The date of the order for abatement or dismissal." |

and in No. 179, column three, paragraph 6, for the words "specified date) the date so specified," the words "certain date) such date" shall be substituted.

## ACT No. VIII OF 1880.

Acts VIII of 1880.
V of 1881.
V of 1882.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the 12th March*, 1880.)

*An Act to correct a clerical error in the Indian Limitation Act*, 1877.

IN the second schedule to the Indian Limitation Act, 1877, No. 171A, column three, for the words "The date of the plaintiff's death," the words "The sixtieth day from the date of the plaintiff's death" shall be, and be deemed to have always been, substituted.

## ACT No. V OF 1881.*

*The Probate and Administration Act*, 1881.

Amendment of Act XV of 1877.

Sec. 156. IN the second schedule to the Indian Limitation Act, 1877, No. 43, after the figures "321," the following shall be inserted, namely—"or under the Probate and Administration Act, 1881, section 139 or 140."

## ACT No. V OF 1882.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the 17th February*, 1882.)

*An Act to define and amend the law relating to Easements and Licenses.*

Preamble.

WHEREAS it is expedient to define and amend the law relating to Easements and Licenses; It is hereby enacted as follows:—

PRELIMINARY.

Short title.

1. This Act may be called "The Indian Easements Act, 1882":

* This Act was passed on the 21st January, 1881, and it came into operation on the 1st day of April, 1881.

ACT V OF 1882.

Local extent.

It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg;

Commencement.

and it shall come into force on the first day of July, 1882.

Savings.

* 2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—

(*a*) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

(*b*) any customary or other right (not being a license) in or over immoveable property which the Government, the public or any person may possess irrespective of other immoveable property; or

(*c*) any right acquired, or arising out of a relation created, before this Act comes into force.

Repeal of Act XV of 1877, sections 26 and 27.

3. Sections 26 and 27 of the Indian Limitation Act, 1877, and the definition of 'easement' contained in that Act, are repealed in the territories to which this Act extends. All references in any Act or Regulation to the said sections, or to sections 27 and 28 of Act No. IX of 1871, shall, in such territories, be read as made to sections fifteen and sixteen of this Act.

## CHAPTER I.

### OF EASEMENTS GENERALLY.

'Easement' defined.

4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to

* This Act does not affect the Madras Forest Act, 1882. See the abstract of proceedings of the Legislative Council (*India Gazette*, 28th October, 1882) and Act XXI of 1882 (an Act to remove doubts regarding the Madras Forest Act).

prevent something being done, in or upon, or in respect of, certain other land not his own.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Dominant and servient heritages and owners.

*Explanation.*—In the first and second clauses of this section, the expression 'land' includes also things permanently attached to the earth: the expression 'beneficial enjoyment' includes also possible convenience, remote advantage, and even a mere amenity; and the expression 'to do something' includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

*Illustrations.*

(*a.*) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(*b.*) A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(*c.*) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.

(*d.*) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.

(*e.*) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(*f.*) A is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.

Continuous and discontinuous, apparent and non-apparent easements.

5. Easements are either continuous or discontinuous, apparent or non-apparent.

ACT V OF 1882.

A continuous easement is one whose enjoyment is, or may be, continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

*Illustrations.*

(*a.*) A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

(*b.*) A right of way annexed to A's house over B's land. This is a discontinuous easement.

(*c.*) Rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(*d.*) A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

Easement for limited time or on condition.

6. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

Easements restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely) :—

Exclusive right to enjoy.

(*a.*) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

Rights to advantages arising from situation.

(*b.*) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

*Illustrations of the Rights above referred to.*

(*a.*) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(*b.*) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(*c.*) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(*d.*) The right of every owner of land to so much light and air as pass vertically thereto.

(*e.*) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

*Explanation.*—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the "subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(*f.*) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(*g.*) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(*h.*) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(*i.*) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(*j.*) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for

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the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

*Explanation.*—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

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## CHAPTER II.

### THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

Who may impose easements.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

*Illustrations.*

(*a.*) A is tenant of B's land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(*b.*) A is tenant for his life of certain land with remainder to B absolutely. A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life-interest.

(*c.*) A, B and C are co-owners of certain land. A cannot, without the consent of B and C, impose an easement on the land or on any part thereof.

(*d.*) A and B are lessees of the same lessor, A of a field X for a term of five years, and B of a field Y for a term of ten years. A's interest under his lease is transferable; B's is not. A may impose on X, in favour of B, a right of way terminable with A's lease.

Servient owners.

9. Subject to the provisions of section eight, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

*Illustrations.*

(*a.*) A has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B's stream. B may grant

to C the right to divert the water of the stream from noon to sunset: provided that A's supply is not thereby diminished.

(*b.*) A has, in respect of his house, a right of way over B's land. B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that A's right of way is not thereby obstructed.

Lessor and mortgagor.

10. Subject to the provisions of section eight, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

*Explanation.*—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Lessee.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

Who may acquire easements.

12. An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same.

One of two or more co-owners of immoveable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immoveable property can acquire, for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease.

Easements of necessity and *quasi* easement.

13. Where one person transfers or bequeaths immoveable property to another,—

(*a*) if an easement in other immoveable property of the trans-

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feror or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(*c*) if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(*d*) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(*f*) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (*a*), (*c*) and (*e*), are called easements of necessity.

Where immoveable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

*Illustrations.*

(*a*.) A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only, over A's adjoining land to the field sold.

(*b*.) A, the owner of two fields, sells one to B, and retains the other.

The field retained was at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to B. A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.

(*c.*) A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

(*d.*) A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands.

(*e.*) A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light, and C takes the land subject to the restriction that he may not build so as to obstruct such light.

(*f.*) A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house, sells the land to B, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.

(*g.*) A, the owner of a house, sells B a factory built on adjoining land. B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.

(*h.*) A, the owner of two adjoining houses, Y and Z, sells Y to B, and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.

(*i.*) A, the owner of two adjoining buildings, sells one to B, retaining the other. B is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.

(*j.*) A, the owner of two adjoining buildings, sells one to B, and the other to C. C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.

(*k.*) A grants lands to B for the purpose of building a house thereon.

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B is entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.

(*l.*) Under the Land Acquisition Act, 1870, a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The Company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.

(*m.*) Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

(*n.*) A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.

Direction of way of necessity.

14. When right to a way of necessity is created under section thirteen, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

Acquisition by prescription.

15. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

*Explanation I.*—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

*Explanation II.*—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

*Explanation III.*—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

*Explanation IV.*—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to Government this section shall be read as if, for the words "twenty years," the words "sixty years" were substituted.

*Illustrations.*

(*a.*) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgment.

(*b*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.

(*c.*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted

that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

Exclusion in favour of reversioner of servient heritage.

16. Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

*Illustration.*

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C had a life-interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Rights which cannot be acquired by prescription.

17. Easements acquired under section fifteen are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired :—

(*a*) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed ;

(*b*) a right to the free passage of light or air to an open space of ground ;

(*c*) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise ;

(*d*) a right to underground water not passing in a defined channel.

Customary easements.

18. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

*Illustrations.*

(*a.*) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(*b.*) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.

Transfer of dominant heritage passes easement.

19. Where the dominant heritage is transfered or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

*Illustration.*

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

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## CHAPTER III.

### THE INCIDENTS OF EASEMENTS.

Rules controlled by contract or title.

20. The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Incidents of customary easements.

And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

Bar to use unconnected with enjoyment.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

*Illustrations.*

(*a.*) A, as owner of a farm Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(*b.*) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

Exercise of easement.

Confinement of exercise of easement.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

*Illustrations.*

(*a.*) A has a right of way over B's field. A must enter the way at either end and not at any intermediate point.

(*b.*) A has a right annexed to his house to cut thatching-grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.

Right to alter mode of enjoyment.

23. Subject to the provisions of section twenty-two, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

*Exception.*—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

*Illustrations.*

(*a.*) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(*b.*) A has a right to discharge on B's land the rain-water from the

eaves of A's house. This does not entitle A to advance his eaves if, by so doing, he imposes a greater burden on B's land.

(*c.*) A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.

(*d.*) A, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

Right to do acts to secure enjoyment.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

*Illustrations.*

(*a.*) A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(*b.*) A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.

(*c.*) A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.

(*d.*) A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.

(*e.*) A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.

(*f.*) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.

(*g.*) A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.

Liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

Liability for damage from want of repair.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

Servient owner not bound to do anything.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement: but he must not do any act tending to restrict the easement or to render its exercise less convenient.

*Illustrations.*

(*a.*) A, as owner of a house, has a right to lead water and send sewage through B's land. B is not bound as servient owner to clear the watercourse or scour the sewer.

(*b.*) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(*c.*) A, in respect of his house, is entitled to an easement of support from B's wall. B is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(*d.*) A, in respect of his mill, is entitled to a watercourse through B's land. B must not drive stakes so as to obstruct the watercourse.

(*e.*) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect :—

Extent of easements.

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Easement of necessity.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

Other easements.

In the absence of evidence as to such intention and purpose—

(*a*) a right of way of any one kind does not include a right of way of any other kind :

Right of way.

(*b*) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made :

Right to light or air acquired by grant.

(*c*) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used :

Prescriptive right to light or air.

(*d*) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose : and

Prescriptive right to pollute air and water.

(*e*) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

Other prescriptive rights.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Increase of easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the

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easement is proportionately increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

*Illustrations.*

(*a.*) A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.

(*b.*) A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(*c.*) A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

Partition of dominant heritage.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and in the case of prescriptive rights, with the user during the prescriptive period.

*Illustrations.*

(*a.*) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(*b.*) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(*c.*) A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

Obstruction in case of excessive user.

31. In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

*Illustration.*

A, having a right to the free passage over B's land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user.

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## CHAPTER IV.

### THE DISTURBANCE OF EASEMENTS.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

*Illustration.*

A, as owner of a house, has a right of way over B's land. C unlawfully enters on B's land, and obstructs A in his right of way. A may sue C for compensation, not for the entry, but for the obstruction.

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto; provided that the disturbance has actually caused substantial damage to the plaintiff.

*Explanation I.*—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section thirty-four.

*Explanation II.*—Where the easement disturbed is a right to

the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

*Explanation III.*—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

*Illustrations.*

(*a*.) A places a permanent obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.

(*b*.) A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to A.

When cause of action arises for removal of support.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

Injunction to restrain disturbance.

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement,—

(*a*) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this chapter:

(*b*) if the disturbance is only threatened or intended,—when the act threatened or intended must necessarily, if performed, disturb the easement.

Abatement of obstruction of easement.

36. Notwithstanding the provisions of section twenty-four, the dominant owner cannot himself abate a wrongful obstruction of an easement.

## CHAPTER V.



### THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS.

Extinction by dissolution of right of servient owner.

37. When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

*Exception.*—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section ten.

*Illustrations.*

(*a.*) A transfers Sultanpur to B on condition that he does not marry C. B imposes an easement on Sultanpur. Then B marries C. B's interest in Sultanpur ends, and with it the easement is extinguished.

(*b.*) A, in 1860, let Sultanpur to B for thirty years from the date of the lease. B, in 1861, imposes an easement on the land in favour of C, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. B's interest in Sultanpur then ends, and with it C's easement.

(*c.*) A and B, tenants of C, have permanent transferable interests in their respective holdings. A imposes on his holding an easement to draw water from a tank for the purpose of irrigating B's land. B enjoys the easement for twenty years. Then A's rent falls into arrear and his interest is sold. B's easement is extinguished.

(*d.*) A mortgages Sultanpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section ten. The land is sold to D in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

Extinction by release.

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

*Explanation I.*—An easement is impliedly released—

(*a*) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the neces-

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sary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority;

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

*Explanation II.*—Mere non-user of an easement is not an implied release within the meaning of this section.

*Illustrations.*

(*a.*) A, B and C are co-owners of a house to which an easement is annexed. A, without the consent of B and C, releases the easement. This release is effectual only as against A and his legal representative.

(*b.*) A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.

(*c.*) A, having the right to discharge his eavesdroppings into B's yard expressly authorizes B to build over this yard to a height which will interfere with the discharge. B builds accordingly. A's easement is extinguished to the extent of the interference.

(*d.*) A, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(*e.*) A, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on B's land permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on C's land. The easement is impliedly released.

Extinction by revocation.

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

Extinction on expiration of limited period or happening of dissolving condition.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.

*Illustration.*

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished.

Extinction of useless easement.

42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

Extinction by permanent change in dominant heritage.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

(*a*) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(*b*) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(*c*) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

Extinction on permanent alteration of servient heritage by superior force.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement:

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage; and the provisions of section fourteen apply to such way.

*Illustrations.*

(*a.*) A grants to B, as the owner of a certain house, a right to fish in a river running through A's land. The river changes its course permanently and runs through C's land. B's easement is extinguished.

(*b.*) Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.

ACT V OF 1882.

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

*Illustration.*

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.

Extinction by unity of ownership.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

*Illustrations.*

(*a.*) A, as the owner of a house, has a right of way over B's field. A mortgages his house, and B mortgages his field to C. Then C forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(*b.*) The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in section forty-one.

(*c.*) The servient owner acquires the dominant heritage in connection with a third person: the easement is not extinguished.

(*d.*) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(*e.*) The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished.

(*f.*) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(*g.*) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.

Extinction by non-enjoyment.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed

by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner.

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(*a*) where the cessation is in pursuance of a contract between the dominant and servient owners;

(*b*) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period, or

(*c*) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

*Illustration.*

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

Extinction of accessory rights.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

*Illustration.*

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section forty-seven. The right of way is also extinguished.

Suspension of easement.

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

Servient owner not entitled to require continuance.

50. The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section twenty-six, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or supension.

*Illustration.*

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

Revival of easements.

51. An easement extinguished under section forty-five revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by

the deposit of alluvion; (*b*) when the destroyed heritage is a servient building, and before twenty years have expired such building is rebuilt upon the same site; and (*c*) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section forty-six revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section forty-seven

*Illustration.*

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

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## CHAPTER VI.

### LICENSES.

'License' defined.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

Who may grant license.

53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

Grant may be express or implied.

54. The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

ACT V OF 1882.

Accessory licenses annexed by law.

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

*Illustration.*

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.

License when transferable.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

*Illustrations.*

(*a*.) A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immoveable property of B. The right cannot be transferred.

(*b*.) The Government grant B a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

Grantor's duty to disclose defects.

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty not to render property unsafe.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

Grantor's transferee not bound by license.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

License when revocable.

60. A license may be revoked by the grantor, unless—

(*a*) it is coupled with a transfer of property and such transfer is in force :

(*b*) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

Revocation express or implied.

61. The revocation of a license may be express or implied.

*Illustrations.*

(*a.*) A, the owner of a field, grants a license to B to use a path across it. A, with intent to revoke the license, locks a gate across the path. The license is revoked.

(*b.*) A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked.

License when deemed revoked.

62. A license is deemed to be revoked—

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license :

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative :

(*c*) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled :

(*d*) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right :

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license :

(*f*) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable :

(*g*) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist :

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee :

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

ACT V OF 1882.

Licensee's rights on revocation.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

Licensee's rights on eviction.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

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